> Mr. House's jeans near the cuff, there was no blood on the shoes he was wearing at the time of the offense. The shoes were found in the general area of Ms. Turner's trailer long after the murder.

Memorandum Opinion, February 16, 2000 at 25.

The court recounted the discovery of the blue jeans in these terms:

> TBI Agent Charles Scott testified that he became involved in the investigation of Mrs. Muncey's murder, at the request of another agent, on the second day of the investigation. He took a statement from Mr. House and obtained consent to search from Ms. Turner. He went to Ms. Turner's home and seized a pair of blue jeans from the clothes hamper in the bathroom. The jeans had "reddish brown" stains that he suspected was [sic] blood on the upper part of the jeans and near the cuff; there was also some light colored mud that was not completely dry.
>
> Mr. Scott did not thoroughly examine the jeans at that time but rather folded them and put them in a paper bag. Mr. Scott did not recall ever seeing the jeans in a plastic bag.

Memorandum Opinion, February 16, 2000, at 23.

The court then summarized the testimony of House's expert witnesses. Larry Johnson testified as an expert in crime scene investigation and opined that "the packaging of materials in the case did not meet professional standards" because items were not wrapped separately. DNA expert Lisa Calandro eliminated House as the donor of the semen found on Mrs. Muncey's underwear and nightgown.

Howard Bragdon testified for House as well. Bragdon was the manager of laboratory operations for DCI Laboratory in Nashville. This laboratory had performed the blood analysis for House at trial. Bragdon noted that he took possession of the blue jeans, the victim's clothes and fingernail scrapings, as well as blood from both the victim and House, on October 29, 1985. The next day, after transporting them to Nashville, he took pictures that showed dried blood around the upper left corner of the box in which the items had been contained. According to the district court, "Mr. Bragdon admitted that it was his custom to inspect the condition of serological evidence when he took possession and that there was no notation on the receipt of spillage. Mr. Bragdon also admitted that he had no way of knowing the condition of the blood samples at the time of the FBI's serological testing." Memorandum Opinion, February 16, 2000, at 35.

The court characterized Dr. Blake's testimony as follows:

> Dr. Blake testified that there was no total chain of custody. Also, according to Dr. Blake, Dr. Carabia [the coroner] failed to refrigerate and preserve the blood in the tubes, failed to seal the tubes of blood, which could result in spillage, and failed to package the items individually.
>
> Dr. Blake's testimony was based upon his review of photographs of the physical evidence, and was relevant to Dr. Blake's opinion that the blood on petitioner's blue jeans resulted from spillage of Mrs. Muncey's blood in the laboratory tubes . . .
>
> . . . .
>
> Dr. Blake testified that if fresh blood had spilled on the blue jeans while Mrs. Muncey was alive, and then dried, the enzymes on the jeans would not have deteriorated to the same extent as the enzymes in the blood taken from Mrs. Muncey. From this, Dr. Blake concluded the blood was not spilled on the jeans but rather came from the spillage of the test tubes.

> Dr. Blake also testified with respect to the age of Mr. House's bruises, based upon photographs taken from the state court record. Dr. Blake estimated some bruises at one to two days old; others at five to six days old. Also, in Dr. Blake's opinion, the bruising on Mr. House's right ring finger was an injury from being mashed; it was not consistent with striking someone.

Memorandum Opinion, February 16, 2000, at 37-38.

The district court also summarized the testimony of the blood spatter expert, Ms. Sutton, and noted that her testimony contradicted the theory that blood had spilled from the vials onto the blue jeans "because the blood and mud [with which it had mixed] would have had to have spilled at the same time." Memorandum Opinion, February 16, 2000, at 42.

With respect to the blood, the court determined:

> Without question, one or more tubes of Mrs. Muncey's blood spilled at some time. It is likely the spillage occurred prior to the receipt of the evidence by [the] laboratory hired by Mr. House's trial attorney. Based upon the evidence introduced during the evidentiary hearing, however, the court concludes that the spillage occurred after the FBI crime laboratory received and tested the evidence.
>
> . . . [T]he enzyme deterioration, as well as Mr. Muncey's alleged confession and the blood spillage, does not negate the fact that Agent Scott saw what appeared to be bloodstains on Mr. House's blue jeans when the jeans were removed from the laundry hamper at Ms. Turner's trailer and that the blood was in fact from Mrs. Muncey.

Memorandum Opinion, February 16, 2000, at 45-46.

As indicated in the passage above, House not only presented evidence to the district court that undermined the case against him, he also offered an alternative theory of the crime: that Mr. Muncey killed his wife.

At the evidentiary hearing, House produced witnesses who testified about Mr. Muncey's alcoholism and also his physical abuse of his wife. One acquaintance, Kathy Parker, testified that "[Mrs. Muncey] was constantly with black eyes and busted mouth." A friend, Hazel Miller, testified that Mr. Muncey told her that he was going to get rid of his wife a few months before her death. In the district court, Mr. Muncey acknowledged that he "smacked" his wife at least once.

As for the day of the murder, Mr. Muncey was supposed to have helped to dig a grave. He had gone over to his father's place, helped to work on some cars, and then dug the grave. However, rather than go home, he decided to attend the weekly dance at the C & C Recreation Center, where, according to his testimony, he stayed until midnight. When he arrived home, he found his wife missing.

Kathy Parker told the district court that Mr. Muncey visited her on a Friday in 1985 after the murder. Friends were sitting around drinking when Mr. Muncey "started crying and going on and rambling off." According to Parker, he was "[t]alking about what happened to his wife and how it happened and he didn't mean to do it, but I don't know exactly what all was said." She went on, "[H]e said they had been into an argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for it to happen." According to Parker, Mr. Muncey was drunk when he made this confession. After hearing it, Parker claimed, "I freaked out and run him off." The next day Parker's mother took her to the courthouse to tell someone about the confession. However, she "never did really get to talk to anybody." When the district court asked her about the motivation behind her testimony in the evidentiary hearing, she replied, "An innocent man is in jail."

On cross-examination, Parker testified that she had tried to come forward but no one seemed interested. She had had seven or eight beers on the night of the confession.

Parker's sister, Penny Letner, also testified to having heard such a confession from Little Hube. Once again, she recalled that he was "pretty well blistered." According to Letner, Mr. Muncey confessed to killing his wife when he returned home:

> He said he didn't mean to do it. That she was "bitching him out" because he didn't take her fishing that night, that he went to the dance instead. He said when he come home that she was still on him pretty heavily "bitching him out" again and that he smacked her and that she fell and hit her head. He said I didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder.

Letner had not been drinking. She was frightened by the talk and left the party. As a young mother of 19, she testified that she had been too scared to report the confession.

Based upon the statements of Letner and Parker, House posits the following scenario:

> When Mr. Muncey got home, he and his wife resumed their fight. He hit her at least once and she fell. When he checked, he found that he had killed her. He took her body down by a creek running near their home and hid it with some brush and branches.
>
> Whether Mr. Muncey ever went back to the dance is uncertain. Constable Wallace, who was providing security at the dance, testified that he never saw Mr. Muncey return after he left around 10:30 p.m. Mr. Muncey claimed during the hearing that he never left the dance until it broke up some two or more hours later.

Petitioner's Brief at 33-34. House also points out that Dennis Wallace[4] did not think that Mr. Muncey seemed upset when he reported his wife's disappearance or when the body was recovered. Also, the morning after the murder, Mr. Muncey asked a neighbor, Artie Lawson, to tell people that he was at the dance. Since she had not attended it herself, Ms. Lawson declined. Her daughter, Mary Atkins, testified that she not only saw Little Hube at the dance, but that she saw him hit his wife.

The district court discounted the testimony of Letner and Parker, finding their testimony lacking in credibility:

> The court is not impressed with the allegations of individuals who wait over ten years to come forward with their evidence. This is especially true when there was no physical evidence in the Munceys' kitchen to corroborate his alleged confession that he killed her there.

Memorandum Opinion, February 16, 2000, at 45. Instead, the court credited the testimony of Laura Muncey Tharp, the victim's daughter, who testified at both the trial and evidentiary hearing:

> While in bed, she heard a deep voice saying her dad had been involved in a wreck next to the creek. Sometime later she and her brother got up and went looking for their mother. They went to the neighbors and looked up and down the driveway. She did not see anything out of the ordinary in the house; nothing was out of place and there was no sign of a struggle.
>
> According to Ms. Tharp, her parents got along fine. They argued, but she did not recall any physical pushing or hitting. If they argued, she could hear them if she was in her

[4] Dennis Wallace was the Chief of Police of Luttrell, the nearest town.

bedroom. The family did not have air conditioning in the home. She did not hear any arguments that night.

The court found Ms. Tharp a very credible witness. She had no reason to lie. Her testimony during the evidentiary hearing was consistent with her trial testimony.

Memorandum Opinion, February 16, 2000, at 12-13.

As the preceding recitation makes clear, House has mounted a concerted attack on his conviction. Indeed, it is fair to say that he has presented a colorable claim of actual innocense. However, as the Supreme Court has made clear, that is not the standard that we are bound to apply. To prevail, House must do more than raise questions about the reliability of portions of trial testimony or the manner in which physical evidence was handled or analyzed; he must show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. Moreover, in weighing the new evidence we review the factual findings of the district court for clear error. *Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001).

The following facts that implicate House are undisputed: he lied to investigators about his whereabouts on the night of the murder; he gave inconsistent versions of the origins of the scratches and bruises on his hands and arms; he was seen near where the body was discovered on the day after the murder; he lied about what he was wearing on the night of the murder; blue jeans belonging to House, spattered with blood mixed with mud, were found at the bottom of Ms. Turner's laundry hamper; House has a deep voice and Laura Muncey testified that the man who came to the trailer on the night of the murder had a deep voice; and, according to Ms. Sutton, the blood and mud found together on House's blue jeans had been mixed together, which "certainly eliminates the possibility of any stains being created by contamination in an evidence container." We note that the fact that mud may not have been present at the crime scene, and may have been scarce in the surrounding area, cannot be taken as proof that there was no mud anywhere on the route between Ms. Turner's trailer and the scene of the crime.

With respect to House's theory that Mr. Muncey committed the murder, we defer to the finding of the district court that Ms. Letner and Ms. Parker, who allegedly heard Mr. Muncey's confession, were not credible. Furthermore, the content of Ms. Letner's testimony, indicating that Mr. Muncey killed his wife upon returning to the trailer, is belied by the presence of the children in the trailer, who heard no such confrontation, and the lack of any signs of a struggle. House's theory that a deep laceration cutting across Mrs. Muncey's head was caused when she fell and hit her head is inconsistent with the testimony of Dr. Carabia, who indicated that the laceration could only have resulted from a violent blow. The fact that Mr. Muncey may have asked his neighbor to say that she saw him at the dance during the time of the murder is insufficient to tip the balance in favor of House's theory.

Regarding House's attacks on the scientific evidence that incriminated him, he has succeeded in showing that the semen attributed to him during the trial was that of Mr. Muncey and that, at some point, the blood evidence appears to have been mishandled, resulting in spillage. However, the fact that the semen found on the victim's clothing came from her husband and not from House does not contradict the evidence that tends to demonstrate that he killed her after journeying to her home and luring her from her trailer, nor does the lack of any physical evidence of sexual contact contradict the notion that the murderer lured Mrs. Muncey from her home with a sexual motive. As for the mishandling of the blood evidence, the theory that the blood on House's jeans came from the vials of blood gathered at Mrs. Muncey's autopsy is based upon a speculative theory regarding enzyme degradation that was contradicted by other testimony in the record, and an analysis of the blood stain pattern does not demonstrate that the stains could not have resulted from Mrs. Muncey's murder. The lack of any blood spatter on House's shoes is inconclusive as well, because it is not clear when House took his shoes off. Finally, the district court's conclusion that "the spillage occurred after the FBI crime laboratory received and tested the evidence" cannot be characterized as clearly

erroneous. The only unchallenged blood evidence, the testimony indicating that the blood and mud on the jeans were mixed, tends to support the conclusion that House committed the murder.

Despite his best efforts, the case against House remains strong. We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.

IV.

All of the issues before us having been decided, the judgment of the district court is **affirmed**.

DISSENT

MERRITT, Circuit Judge, dissenting. I regard this as the rare or extraordinary case in which the petitioner through newly discovered evidence has established his actual innocence of both the death sentence and underlying homicide. The Court's opinion, like the Attorney General's argument for the State, regards as "undisputed" old evidence and inferences that are now contradicted by other evidence in the case. It fails to describe adequately the persuasive case of actual innocence that the petitioner's newly discovered evidence raises. Nor does it adequately describe the legal standards to be applied.

This dissent will first describe the constitutional standards applicable in "actual innocence" cases such as this one. There are four actual innocence theories applicable in this case based on the body of newly discovered evidence presented at the federal habeas hearing: (1) a "free-standing," substantive, so-called "*Herrera*" actual innocence claim, (2) a procedural, or "gateway," so-called "*Schlup*" actual innocence claim, (3) the more limited "gateway" claim that the petitioner is "actually innocent of the death penalty" because the new body of evidence shows that petitioner is not now eligible for the death penalty because the rape aggravator has been disproved, and (4) a free-standing, substantive "actual innocent of the death penalty" claim. It will then outline the evidence in detail and apply the standards in four parts, as follows:

First, at the state trial in Maynardville, Union County, Tennessee, in 1986, and in its argument to uphold the death verdict in the Tennessee Supreme Court, the State relied on rape as the motive for the kidnapping and the murder of Carolyn Muncey. There was no other motive offered. It relied on a semen specimen on her nightgown as proof that House tried to rape her. Newly discovered DNA evidence now conclusively establishes that the semen was her husband's. There is now absolutely no evidence of sexual assault. The new evidence disproves the motive the jury accepted as the basis for the kidnapping and murder and the aggravating circumstances the jury found as its basis for the death penalty.

Second, besides the semen evidence, the State introduced at the trial one other piece of highly incriminating scientific evidence: evidence of Carolyn Muncey's blood on House's blue jeans worn on the night of the murder. At the 1999 federal habeas hearing, the State's case was undermined by the State's own medical examiner, Dr. Cleland Blake. As "Consultant in Forensic Pathology" for the Tennessee Bureau of Investigation for 22 years, Dr. Blake has testified for the prosecution in the past in hundreds of cases. Four vials of blood were extracted at the time Carolyn Muncey was autopsied. Dr. Blake, the State's medical examiner, testified at length that he had no doubt that the blood on House's pants was spilled from one of these four vials of blood shipped to the lab by local law enforcement agents — spilled either accidentally or intentionally. There is no explanation besides spillage for the fact that one of the four vials of blood was empty. The new body of evidence shows conclusively that the vials of blood were not properly handled and shipped by law enforcement and that the blood that spilled from the vials cannot otherwise be accounted for.

Third, testimony from five new witnesses offered at the habeas hearing implicates Mr. Muncey in his wife's murder. The new evidence discloses that Mr. Muncey, with a flood of tears, confessed to two women friends after the murder that he had killed his wife. He told a third woman that he was going to "get rid" of Carolyn a few weeks before the murder. He asked a fourth woman to provide him with an alibi on the night of the murder and gave testimony about his whereabouts that night at the time of the murder that has now been contradicted by a local law enforcement officer. The State offered no evidence that any of these witnesses was biased in favor of House or prejudiced against Mr. Muncey.

Fourth, the evidence completely undermines the reliability of the testimony of Billy Ray Hensley, the witness who said that on Sunday afternoon before the victim's body was found, he saw House coming up the embankment on Ridgecrest Road where the body was later found that day. Based on his own

testimony and an examination of the record, it would have been impossible for Hensley to see House as he claimed.

Union County, Tennessee, is a small rural county in the hill country of East Tennessee. It has a population of 12,000. Maynardville, population 1,000, is the county seat where Carolyn Muncey's murder was investigated and tried. Local law enforcement officials from the Sheriff's office testified that immediately after the murder they had two suspects, House and the victim's husband, Hubert Muncey, called "Little Hube." Mr. Muncey grew up and was well-known in the local community. Although "Little Hube" had a history of severe domestic abuse, the local police chose House as the murder suspect when he told them two days after the body was found that he had just recently moved into the local Luttrell community and that he had a sexual assault conviction in Utah and after they had developed other incriminating evidence.

In its opinion in 1987, affirming House's conviction, the Supreme Court of Tennessee noted the semen evidence and rape as the motive for the homicide. It noted that House had "never confessed to any part in the homicide, and the testimony linking him to it was circumstantial." The Court also observed that the Munceys "had been having marital difficulties and that she had been contemplating leaving him." *State v. House*, 743 S.W.2d 141, 143 (Tenn. 1987). The case comes down to the question of whether the newly discovered evidence undermining the case against House and incriminating Mr. Muncey is sufficiently strong — despite the uncertainties that remain — to preclude a rational juror from finding guilt beyond a reasonable doubt and to make the execution of House "constitutionally intolerable."

I. Standards for Actual Innocence Claims

Schlup v. Delo, 513 U.S. 298 (1995), is the only Supreme Court case that has discussed and compared the standards to be applied in three of the four different types of actual innocence claims that may be asserted in habeas: (1) "free standing," (2) "gateway" and (3) "innocent of the death penalty" gateway claims. There, in an opinion for six members of the Court, Justice Stevens wrote that it is "firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt," and that "the analysis [of actual innocence claims] must incorporate the understanding that proof beyond a reasonable doubt marks the boundary between guilt and innocence." *Id.* at 328. This starting point is a major factor for all types of actual innocence claims. For such claims, this factual analysis is always a "probabilistic determination" about the behavior of a reasonably instructed juror. *Id.* at 329.

1. Gateway, Actual Innocence Claims. — In *Schlup*, 513 U.S. at 316, the Court stated that for substantive, free-standing claims where the "conviction was the product of a fair trial," the "evidence of innocence would have had to be strong enough to make an execution 'constitutionally intolerable.'" Yet, when a claim of innocence is coupled with an assertion of constitutional error at trial, the "conviction may not be entitled to the same degree of respect." *Id.* Thus, the "evidence of innocence need carry less of a burden." *Id.* In *Schlup*, as in House's gateway claim in the instant case, the claim of constitutional error at the original trial was ineffective assistance of counsel; and the actual innocence claim was used as a "gateway" to overcome procedural default in order to reinstate the ineffective assistance claim and render it again cognizable. For such gateway or procedural claims, the *Schlup* opinion holds that a petitioner must demonstrate that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

2. Gateway Innocent of the Death Penalty Claims. — The Court in *Schlup* discussed and left intact the standard for claims of "innocent of the death penalty" (claims that the evidence of aggravating circumstances at the sentencing phase of the case is insufficient to render the defendant eligible for the death penalty) — a standard announced in the previous case of *Sawyer v. Whitley*, 505 U.S. 333 (1992). In such "innocent of the death penalty" claims governed by *Sawyer*, the question is always whether the petitioner's proof of innocence is sufficient to overcome a procedural default and render a defaulted constitutional claim again cognizable. Quoting *Sawyer*, the Court said that claims of actual innocence of the death penalty at

the sentencing phase "must focus on those elements which render the defendant guilty of the death penalty" and show "by clear and convincing evidence" that "no reasonable juror would have found the petitioner eligible for the death penalty" beyond a reasonable doubt. *Schlup*, 513 U.S. at 323. This is the standard applicable to the question of innocence of the rape-homicide aggravator found by the jury at House's trial. If found, it would make House's ineffective assistance of counsel claim at the penalty phase of the case cognizable.

3. Free-standing Actual Innocence Claims. — In *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court did not spell out a standard for free-standing substantive claims of actual innocence in cases which presuppose a fair trial. Instead, it merely noted that the required "threshold showing" would be "extraordinarily high." 506 U.S. at 417. In a concurring opinion, Justice White sets out a very demanding standard:

> I assume that a persuasive showing of "actual innocence" made after trial, even though made after the expiration of the time provided by the law for the presentation of newly discovered evidence would render unconstitutional the execution of petitioner in this case. To be entitled to relief, however, petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, "*no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.*"

Id. at 429 (White, J., concurring) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)) (emphasis added).[1] As laid out below, the White standard is appropriate to apply in free-standing actual innocence claims. Justice White's proposed standard borrows language from *Jackson*, in which the Court established the test governing habeas review of claims of insufficient evidence. In *Jackson*, the Court found that due process guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof — defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of the element of the offense," 443 U.S. at 316. When petitioners make *Jackson* claims, they assert that the trial leading to their conviction was flawed in that the evidence of guilt presented in the trial record was insufficient to support the verdict.

With free-standing actual innocence claims, petitioners are not claiming that their trial violated constitutional due process requirements due to insufficient evidence. Instead *Herrera* claims are to provide relief to one who faces the death penalty and can make a truly persuasive case of innocence. In order to prevent what the Supreme Court describes as "constitutionally intolerable," *Schlup*, 513 U.S. at 316, courts must consider newly discovered evidence in addition to the trial record. The proof established at the original trial must be examined in light of what is newly proffered to determine if all the available evidence would support conviction. The White standard is appropriate for use in free-standing actual innocence cases as it is a very high standard that will only be met in exceptional cases where new evidence has unquestionably undermined the case against the petitioner. It also forces courts to make an objective determination regarding what a fact finder *could* find rather than what a hypothetical juror *would* find.

Utilizing Justice White's standard would permit courts to adequately address the rare case of actual innocence without becoming bogged down by non-meritorious claims. Justice O'Connor in *Herrera* noted the Court's concern that if the standard for free-standing actual innocence cases is set too low, "federal courts will be deluged with frivolous claims of actual innocence." 506 U.S. at 426 (O'Connor, J., concurring). The White standard borrowed from *Jackson* addresses this concern as new evidence would have to so undermine the case against the petitioner as to make the conviction untenable and the imposition

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[1] Justice Blackmun for himself and Justices Stevens and Souter also defined a standard for free-standing actual innocence cases stating that "a prisoner must show not just that there was probably a reasonable doubt about his guilt but that he is probably actually innocent." 506 U.S. at 434-35 (Blackmun, J., dissenting). The White standard does not appear to be at odds with the formulation suggested by Justice Blackmun. Petitioners who could meet the White "no rational juror" test would also meet the Blackmun "probably innocent" standard.

of the death penalty constitutionally intolerable. The Court has noted that the *Jackson* standard is an incredibly high hurdle for a petitioner to jump. *See Schlup*, 513 U.S. at 323 n.38 ("Even the high standard of proof set forth in *Sawyer* falls short of the *Jackson* standard governing habeas review of claims of insufficiency of evidence."). Under the proposed standard, "the mere existence of sufficient evidence to convict would be determinative of a petitioner's claim." *Id.* at 330.

The inquiry as to whether any rational juror could convict also seeks to make the determination of actual innocence more objective. As the Supreme Court wrote, describing the standard, "the use of the word 'could' focuses the inquiry on the power of the trier of fact to reach its conclusion," whereas "the use of the word 'would' focuses the inquiry on the likely behavior of the trier of fact." *Id.* Whether a rational fact finder would have the ability to convict the petitioner in light of all available, reliable, and relevant evidence "requires a binary response." *Id.* Either the evidence is sufficient to support the conviction or it is not. The analysis thus interferes with the original trial determination only to the extent necessary to ensure that a prisoner is not executed when the available evidence cannot support his conviction. This Court should adopt Justice White's standard from *Herrera*, and the writ should issue if in light of newly discovered evidence, no rational trier of fact *could* find proof of guilt beyond a reasonable doubt.

4. Free-standing Innocent of the Death Penalty Claims. — Although not discussed in *Schlup* or other cases, for cases raising a substantive, non-gateway claim that the condemned prisoner is not eligible for the death penalty at sentencing, the standard should be the same as the White standard. The petitioner must demonstrate no rational fact finder examining the trial record and the new evidence could impose the death penalty. If he can disprove the aggravator for which he was sentenced to death, it is plainly unconstitutional for the sentence to stand.

In my view, as I will now explain, the petitioner has carried his burden of proof on all four theories. He has clearly shown both that a reasonable juror would have a substantive and serious doubt as to his guilt and that the cumulative evidence is insufficient to enable a rational juror to convict House or sentence him to death for the murder of Carolyn Muncey.

II. Rape as House's Motive — the Semen Evidence

In its opinion, the Tennessee Supreme Court in its factual statement recounted evidence of rape as the motive for the kidnapping and murder noting that "there were found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant," *State v. House*, 743 S.W.2d 141, 143 (Tenn. 1987), and referring to inferences available to the jury from the fact that "the state proved appellant's prior conviction for aggravated sexual assault." *Id.* at 144.

In light of the evidence introduced at the federal habeas hearing, the State now concedes that the semen specimen found on the nightgown Carolyn was wearing when murdered was "Little Hube's," not House's; and there is no other evidence of rape or sexual assault. The State's concession is based upon DNA analysis introduced at the habeas proceeding by counsel for House. But the State now seems to deny that the semen evidence was introduced at the state trial in 1986 to show that House attempted to rape Carolyn or that rape was the motive offered to the jury for this kidnapping and murder and the basis of the jury's verdict. This argument is simply not consistent with the facts, and the majority opinion does not acknowledge or deal with this problem. The State has no other explanation or evidentiary basis for introducing the semen evidence at the trial other than to show attempted rape as the motive. Because the Court's opinion does not deal with the problem and the State now denies what it strongly claimed when it tried the case and obtained the death verdict, we will itemize in some detail the evidence that contradicts the State's present argument that the prosecution did not rely on rape as the motive for the murder and for the death penalty aggravator.

From the beginning in July 1985, the police and prosecutors viewed this as a rape murder case and so advised the FBI lab and then the jury. In the various lab reports from the FBI to the local prosecutors,

the correspondence is always designated as "rape-homicide." The first lab report described the crime as "rape-homicide" two weeks after the murder:

REPORT

of the

FBI

Laboratory

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

July 29, 1985

To: Mr. Williams Paul Phillips
District Attorney General
Post Office Box 10
Huntsville, Tennessee 37756

FEDERAL EXPRESS

FBI File No.

LAB NO. 50717040 S XI VB VJ
50722020 S XI VB

YOUR NO.

Re: PAUL GREGORY HOUSE - SUSPECT;
CAROLYN MUNCEY - VICTIM;
RAPE - HOMICIDE

Examination requested by: Addressee and Sheriff of Union County, Maynardville, Tennessee

Reference: Letter from District Attorney General dated July 16, 1985, and letter from Sheriff of Union County dated July 19, 1985

Examination requested: Chemical Analyses - Microscopic Analyses - Mineralogy

FBI File, Criminal Trial Exhibits, Addendum No. 2, Exhs. 31 & 32, admitted into evidence, Addendum No. 4, p. 903.[2]

Four such lab reports designating House as the "suspect" and "rape-homicide" as the nature of the case were shown to the jury at House's trial on February 6, 1986, after being admitted into evidence as State's exhibit 32. The jury read a letter from Union County District Attorney William Paul Phillips dated July 16, 1985, to the FBI lab in Washington stating that this was a "sexually motivated attack." *Id.* at p. 6. Then the jury saw four FBI lab reports like the one above referring to House as the "suspect," "Carolyn

[2] Citations to the state trial record will reference the multi-volume Addenda filed during the federal habeas proceeding in Case No. 3:96-CV-488 (E.D. Tenn., Jarvis, J.).

Muncey—victim," and the nature of the case described as "rape-homicide." *Id.* at pp. 4, 10, 12, 34. The FBI lab reports analyze the semen based on the presupposition that it was "House's" semen. On each of the lab reports placed before the jury the words "FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE" are prominently displayed at the top of the page just before "rape-homicide" is identified as the nature of the case and House as the "suspect." *Id.*

The semen evidence referred to in these reports was placed before the jury and came in at the state trial through the testimony of long-time FBI expert Agent Paul D. Bigbee, who specialized in analyzing "physical evidence in criminal cases for the presence of blood and other body fluids." Testimony of Paul Bigbee, Trial Transcript, Addendum No. 4, Vol. VI, p. 883. He testified at length about the semen evidence. Here are a few examples of his testimony on this subject:

Q All right, did you find semen on any of her items of clothing?

A Yes sir, I did.

Q Where did you find the semen?

A I found semen in the panties and on the gown.

. . . .

Q Now, can you tell me, can you detect semen stains at times in determining things about the blood type of the person who emitted or the blood type of the person that semen is from?

A Yes, sir. If the person who deposited the semen is a secretor, which means eighty (80) percent of the population secrete the ABO blood group substances in other body fluids, such as semen and saliva, if that person is a secretor, then the ABO blood type can be determined from the semen.

Q How about Mr. House, is he a secretor?

A Yes sir, he is.

. . . .

Q Can you tell me where, can you hold the gown up and show the jury where on the gown you found semen?

(WITNESS COMPLIES WITH REQUEST)

A If you look on the front of the gown, at the very bottom here, you can see one cutting I took that has the number and letter, 1S, that is the location where I found the semen.

Q On the front of the gown?

A Front bottom portion.

. . . .

Q You may put that back now. What can you tell us about the blood type, if you can tell us anything, of the person who that semen came from, the male that that semen came from?

A The person who deposited that semen was a blood type A.

Q Now, what blood type is Mr. House?

A He is blood type A.

. . . .

Q [T]he semen on the nightgown could be from Mr. Muncey?

A It could be, however, I was not able to determine his secretor status.

Q And he is not definitely a secretor?

A I don't know whether he is or not. I could not determine that.

Q But you know that Mr. House definitely is a secretor?

A Yes, sir.

Q And only if a person is a secretor, can you determine the blood type from the semen, is that right?

A That is correct.

Id. at pp. 896-900.

In the State's argument to the jury at the end of the guilt phase of the trial, the District Attorney told the jury that rape was House's motive in the following words:

> Now you may have an idea why he did it. The evidence at the scene which seemed to suggest that he was subjecting the lady to some kind of indignity, why would you get a lady out of her house, late at night, in her night clothes, under the trick that her husband has had a wreck down by the creek? Why is it that you want to get her down by the creek?.... It is either to keep her from telling what you have done to her, or it is that you are trying to get her to do something that she nor any mother on that road would want to do with Mr. House .... and you kill her because of her resistance.

Closing Argument. Trial Transcript. Addendum No. 4, Vol. IX, pp. 1302-03.

After the jury returned its verdict at the guilt phase of the trial, the District Attorney advised the court in preparation for the sentencing phase of the trial that the State's theory requesting a death sentence is based on "the fact that there was semen on the outer garment, that is the nightgown," and "we say that

the jury could well conclude that this murder occurred in the process of another crime, that being in the process of either rape or attempted rape." Trial Transcript, Addendum No. 4, Vol. X, p. 1381. The prosecutor opened his argument at the sentencing phase by telling the jury:

> The defendant, the proof indicates, has in the past been convicted of aggravated sexual assault which is something that the judge will instruct you that you should consider....We also think the proof shows strong evidence of attempted sexual molestation of the victim to accompany the taking away and murdering her.

Id. at pp. 1410-11. The prosecutor then tied the prior conviction for sexual assault and this attempted rape together arguing in favor of the death penalty because House has "been through the process before and having been convicted of a crime involving . . . aggravated sexual assault," he "cannot benefit from the type of rehabilitation that correction departments can provide." *Id.* at p. 1413. Then at the end of his impassioned argument at the sentencing phase, the District Attorney returned again to this theme asking the question, "did he commit this crime while he was engaged in an attempt at rape?" *Id.* at 1444. And then he answered that question in the affirmative.

As soon as the District Attorney sat down, the court charged the jury that the defendant "was previously convicted of" sexual assault and then defined rape: "I will charge you that rape is the unlawful, carnal knowledge of a woman forcefully and against her will. Carnal knowledge is accomplished by the commencement of the sexual connection and proof of emission is not required." *Id.* at p. 1447. The court again for a second time said in charging the jury that they may sentence the defendant to death if "the murder was committed while the defendant was engaged in committing or was attempting to commit or was fleeing after committing or attempting to commit rape," and defined rape again as "the unlawful carnal knowledge of a woman, forcibly and against her will." *Id.* at p. 1448. The jury then returned its verdict of death saying that its reason for sentencing the defendant to death was that "the murder was committed while the defendant was engaged in committing or was attempting to commit or was fleeing after committing or attempting to commit rape or kidnapping." *Id.* at p. 1455.

When House appealed to the Tennessee Supreme Court, the State in its brief was not hesitant to argue rape as the motive for the kidnapping and the murder and the basis of the jury's death sentence. In its brief, the State argued that the murder was committed while the defendant was engaged in attempting to commit rape and that "[s]emen was found on the victim's gown and panties and was consistent with the defendant's blood type." Brief of the State of Tennessee, S. Ct. No. 2, Union County, filed Apr. 29, 1987, Addendum No. 6, p. 49. It is against this background that the Tennessee Supreme Court cited the prosecution's claim that the evidence proved that "on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant." *State v. House*, 743 S.W.2d at 143. The Tennessee Supreme Court upheld House's conviction and the imposition of the death penalty based upon rape as the motive for the kidnapping and murder. *Id.* at 142. Even at the federal habeas corpus hearing 13 years later, Assistant Attorney General Glenn Pruden for the State, said that at the trial "an aggravating factor was found that this murder was committed in the attempt to commit, to perpetrate a rape and the perpetration of the kidnapping." *House v. Bell*, No. 3-96-CV-883, Transcript of Habeas Hearing, p. 91 (E.D.

Tenn. Feb. 1, 1999).[3] There can be no doubt that the State claimed rape as the motive from the beginning and throughout the trial, and that the jury so found and that the Tennessee Supreme Court approved the verdict on that basis.

The newly discovered evidence conclusively removes rape as the motive and eliminates rape as the aggravating circumstance that made the defendant eligible for the death penalty. Without any evidence of rape, the State has lost its motive, its theory of the case and the aggravating circumstance on which the State and the jury relied for its death verdict. House has met the standard for actual innocence of the death penalty by conclusively disproving the aggravator that made him eligible for the death penalty. No rational, reasonable juror could now find that House raped or attempted to rape Mrs. Muncey. Without any evidence of rape, the court would now have to direct a verdict in favor of House on this issue.

III. The Blood Evidence

The State introduced at trial one other piece of highly incriminating scientific evidence: evidence of Carolyn Muncey's blood on the blue jeans worn by House on the night of the murder. Agent Paul Bigbee, the agent from the FBI laboratory that did the actual testing on the blue jeans in July 1985, shortly after the murder, testified that his testing demonstrated a clear match between the blood on the jeans and Mrs. Muncey's blood. At the 1999 federal habeas hearing, however, the State's case was undermined by its own medical examiner, Dr. Cleland Blake. Dr. Blake, the Assistant State Chief Medical Examiner, has been a consultant in forensic pathology for the Tennessee Bureau of Investigation for 22 years and has testified for the State in hundreds of cases. Dr. Blake testified at length that, based on enzymatic testing results performed by the FBI, he had no doubt that the blood on House's blue jeans was spilled, either accidentally or intentionally, from the vials of blood taken from Mrs. Muncey's body during her autopsy:

> Dr. Blake: I conclude that the deteriorated blood which was in the jeans *came out of the test tube* [because] both [the blood on the jeans and the blood in the vials] had lost the enzyme.
>
> . . .
>
> The Court: So in your opinion then the blood on the jeans and the blood in the tube are one in the same.
>
> Dr. Blake: That is my opinion.

Testimony of Dr. Cleland Blake, Transcript of Habeas Hearing, pp. 116-17, Feb. 2, 1999 (emphasis added). When we add to this testimony the fact that almost all of the blood in one of the vials was spilled and cannot be accounted for, as explained below, Dr. Blake's conclusion that the blood evidence does not now support the jury verdict leaves little room for debate.

Dr. Blake arrived at his conclusion based on his theory of what constitutes normal or ex[illegible] enzymatic degradation of blood in different media; that is, whether the blood is preserved in liquid fo[illegible] test tubes or vials or whether it is dried on cloth or other material. Depending on the medium on which the

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[3] Citations to the federal Habeas Hearing will be referenced as "Testimony of [witness], Transcript of Habeas Hearing, p. ___, [date]."

blood is preserved, and the condition or state of the blood at the time it is preserved, the blood will degrade at different rates. Dr. Blake found an unexpected consistency in enzyme degradation between the liquid sample taken from Mrs. Muncey's body after her death and the five samples of what the government contends is fresh blood that stained House's blue jeans as he allegedly murdered Mrs. Muncey. Simplistically, the blood enzymes at issue here are proteins that are able to function properly only within the living human body. Once outside the body, or after the body is no longer functioning, the enzymes start to break down and lose their structure and shape and no longer function; they degrade and are said to become "denatured." Generally, "fresh" blood from a live victim that comes in contact with dry cloth is "preserved" in a different, and generally better, way than blood that is stored in a test tube.[4]

The blood tests performed by Agent Bigbee of the FBI on the victim's blood, stored in vials after being taken from her body during the autopsy, and the five samples from the defendant's jeans, preserved on the cloth of the blue jeans, looked for the presence of various enzymes (to see whether they had denatured or not) in the blood. Of the ten enzymes tested, six had conclusive results. All six enzymes matched, making it reasonable for Dr. Blake to conclude that the enzymes in the blood on the jeans degraded at the same rate as the blood in the sample taken from the victim's body and stored in glass vials or test tubes. Because they degraded at the same rate despite being "preserved" in two different media – test tube vials and cotton cloth of blue jeans – it appears that the enzymes came from the same sample, that is, the blood on the defendant's jeans came from the sample taken from the autopsy of the victim, not the victim herself when alive.

There is additional strong evidence that the sample in the vials of blood were mishandled or possibly even tampered with and intentionally spilled on the jeans. Four vials of blood were taken from the victim during her autopsy. The vials, along with other evidence, were transported by law enforcement officials between Union County, Tennessee, and the FBI Laboratory in Washington, D.C. and back to Union County. In reaching his conclusion that the blood on House's blue jeans came from the vials of blood taken from Mrs. Muncey after her death, Dr. Blake also noted that the blood evidence had been mishandled in this matter. Although not an expert on the packaging and handling of evidence, Dr. Blake's work requires him to examine evidence that has been packaged and handled by others on a regular basis. He determined in this case that the evidence had been mishandled and that blood had spilled from the vials, causing the contamination of the blue jeans. Testimony of Cleland Blake, Transcript of Habeas Hearing, pp. 50-51, Feb. 2, 1999. Dr. Blake testified that if tubes containing blood are not properly sealed, the stoppers on the tubes may come out if the blood samples become too warm. Testimony of Cleland Blake, Transcript of Habeas Hearing, pp. 51, Feb. 2, 1999.

Detective Larry Johnson, of the Knox County Sheriff's Department, also testified at the habeas hearing as to the packaging and handling of the evidence in this case. Detective Johnson is an expert witness in the area of crime scene investigation, having examined hundreds of homicides, robberies, rapes and other crimes over 30 years. Detective Johnson testified after reviewing reports and photographs of the packaging of the evidence in this case that "the packaging of the materials in the case did not meet professional standards." He testified that although each piece of evidence was separately wrapped, it was placed in one box for transport or shipment, which is not the preferred manner of packaging. He testified

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[4] One technique favored by forensic professionals is to preserve blood samples on dry cotton sheeting or cloth in order to store the samples with minimal degradation over time.

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that the best way is to put the victim's clothing in one container, the suspect's clothing in one container and biological evidence, like blood, in a different container to avoid transfer of potential evidence, such as fiber coming in contact with fiber. All evidence should be separated, labeled and sealed. Testimony of Larry Johnson, Transcript of Habeas Hearing, pp. 105-07, Feb. 1, 1999.

In this case, the testimony of TBI agents Murray and Breeding, who transported the evidence from Tennessee to the FBI in Washington, D.C., reveals that although the evidence from Mrs. Muncey's body may have been *packaged* separately, it was all transported to the FBI in Washington, D.C. in *one* box, contrary to good forensic practice. Testimony of Larry Johnson, Transcript of Habeas Hearing, pp. 104, Feb. 1, 1999. Moreover, it was the height of summer on the July day when the officers transported the material in the trunk of their car from Union County to Washington, D.C. There is no testimony that the trunk was air conditioned or that the blood samples from Mrs. Muncey were otherwise kept cool during the long trip from Tennessee to Washington, D.C. As noted above by Dr. Blake, the stoppers can blow off of blood vials if the sample becomes too warm.

Another witness, Howard Bragdon, worked for DiaClin, the private company that did the blood testing on the evidence at the request of House's attorneys in October of 1985 after it had been in the possession of the government for over three months.[5] Mr. Bragdon transported the evidence, including the Styrofoam box containing the vials of blood, from Union County to DiaClin's offices in Nashville. Testimony of Howard Bragdon, Transcript of Habeas Hearing, pp. 1-6, Feb. 2, 1999. He testified that there was dried blood on the Styrofoam box when he took possession of it. *Id.* at pp. 6-7. The photographs taken by DiaClin in October 1985 and introduced at the habeas hearing clearly show blood staining the Styrofoam container used to transport the blood.

Mr. Bragdon also testified that one of the four vials was only partially full and another was nearly empty. Yet, Agent Bigbee testified that he used only one-fourth of a vial in performing his tests at the FBI lab in Washington, D.C. Mr. Bragdon also testified that two of the vials appeared to be leaking or had leaked when he picked them up in Union County.

The documentation, or lack thereof, concerning the chain of custody of the blue jeans and Mrs. Muncey's blood samples is particularly troubling due to the evidence of possible mishandling of the evidence. The purpose of the chain of custody requirement is to "demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence." *State v. Braden*, 867 S.W.2d 750, 759 (Tenn. Crim. App.1993). While the state is not required to establish facts which exclude every possibility of tampering, the circumstances established must reasonably assure the identity of the evidence and its integrity. *State v. Ferguson*, 741 S.W.2d 125, 127 (Tenn. Crim. App.1987).

The necessary "integrity" is lacking here. One exhibit introduced at the habeas hearing shows the plastic bag labeled by the TBI that contained the blue jeans. Petitioner's Ex. 10-6, Habeas Hearing, Feb. 1999. However, Agent Scott of the TBI testified that he put the jeans in a *paper* bag after retrieving them from the clothes hamper at Donna Turner's house after the murder. Testimony of Charles Scott, Transcript

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[5] Despite the State's implication that it was somehow House's fault that his experts did not have a chance to examine the evidence until three months after the murder, House filed a motion in late July 1985 to gain access to the evidence gathered at the time of the murder for purposes of testing. Motion for Samples, filed July 29, 1985, Addendum No. 1, pp. 5-6.

of Habeas Hearing at p.115, Feb. 3, 1999.[6] In addition, the FBI list of evidence it received from the TBI notes that the jeans were received in a sealed *paper* bag. FBI File, Addendum No. 2, Criminal Trial Exhibits, Ex. 31, pp. 36, 49. The plastic bag bore a label with the name "Charles Scott" written on it, but that label covers part of the markings made on the bag by the FBI, indicating that the label was put on *after* the FBI did its analysis. This sequence of events makes no sense because Charles Scott was the first agent to handle the jeans when he retrieved them from Ms. Turner's house after the murder. Given the evidence that the jeans were originally placed in a paper bag, Agent Scott's label likely was moved from another place – probably the original paper bag – and put on the plastic bag at a later time. The documentation showing the chain of custody for the blue jeans is of no help in sorting out the sequence of events. I can find no subsequent records showing when or by whom the jeans were transferred from the paper bag to the plastic bag.

Finally, adding to the likelihood that the blood samples were spilled on the jeans at some point after they were removed from Ms. Turner's home, the plastic bag holding the blue jeans appeared to have blood stains on it when received by Lisa Calandro, an expert in forensic DNA analysis and biological evidence analysis hired by House. *See* Photograph of plastic bag, Petitioner's ex. 10-6, Habeas Hearing, Feb. 1999; Respondent's Ex. 21, Habeas Hearing, Feb. 1999 (same). Ms. Calandro testified that the outside of the bag tested positive for the presence of blood, but analysis to further identify its source was unsuccessful. Testimony of Lisa Calandro, Transcript of Habeas Hearing, p. 76, Feb. 1, 1999.

This mystery of how the blue jeans got from the paper bag in Tennessee to a plastic bag sometime later, the confusion in the labeling of the bag, the evidence of blood spilled inside the box containing the evidence, and the acknowledgment of missing blood demonstrate that critical evidence in this case was possibly tampered with, or, at the very least, not handled according to recognized protocol and accidentally spilled.

The testimony of Pauline Sutton also raises questions as to whether the jeans were tampered with. She noted that some of the blood stains were mixed with mud. The National Weather Service records show that it had not rained for three days prior to the murder, and photographs of the crime scene showed no mud present. There was no mud on the victim's clothing. This evidence is inconsistent with the State's contention that the mud and blood got on the jeans at the crime scene.

While the State acknowledges, and even stipulates on the record, that some of the blood taken from Mrs. Muncey's body after her death cannot be accounted for and was likely spilled, Statement of Assistant Attorney General Glenn Pruden, Transcript of Habeas Hearing, p. 115, Feb. 1, 1999, as shown by the evidence introduced at the habeas hearing, it has offered no explanation nor even shown any interest in determining what happened to the missing blood.

Unlike many cases where accusations about chain of custody problems or mishandling of evidence are made, this is not a case where an inference of mishandling of the evidence has been made with no

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[6] Clothing evidence is generally not stored in plastic bags because the bags do not "breathe" and any biologic material on the clothing will degrade faster when in a plastic bag than a paper bag. Detective Larry Johnson, an expert on the packaging and handling of evidence, testified that clothing that might contain body fluids should not be placed in plastic because the plastic tends to draw moisture and starts to break down the fluids more quickly. Testimony of Larry Johnson, Transcript of Habeas Hearing, p. 111, Feb. 1, 1999.

evidence to support such an inference or a case where there is simply a short gap in time where custody of the evidence cannot be determined. Here, both parties agree that blood was spilled or leaked from the vials. There is a blood stain on the container that held the blood samples and a blood stain on the plastic bag that contained House's blue jeans. The vials themselves clearly show that significant leakage occurred and blood is missing from at least one of the vials that has not been accounted for through testing. What has not been established is when this spillage or leakage happened or how it happened. This inability to account for the blood through either the chain of custody or testimony from an individual along that chain, and the undisputed existence of blood stains on the container that transported the blood vials eliminates the probative value of the blood evidence. Surely the facts demonstrating the lack of care in handling the evidence, when viewed in conjunction with Dr. Blake's expert testimony that the blood on the blue jeans came from the vials taken from Mrs. Muncey's body after her death, not when she was alive, would lead a reasonable juror, hearing this evidence, to have a substantial and serious doubt as to House's guilt. The Blake testimony together with the spillage creates a high probability that the blood on the House jeans came from a vial of blood.

IV. Newly Discovered Evidence That Mr. Muncey Killed His Wife

In addition to the newly discovered scientific evidence concerning the semen and blood stains, there is now strong independent evidence against Mr. Muncey as the perpetrator of the crime. There is no reason to believe that a jury would reject the testimony of the two life long residents of the Luttrell community who describe Mr. Muncey's weeping confession to them that he killed his wife accidentally while beating her. The women have no reason to fabricate, no axe to grind. Nor is there a reasonable basis for rejecting the highly incriminating testimony of two other women and the security guard at the Saturday night dance. Because the Court and the prosecution question the credibility of these witnesses and the inferences to be drawn from their testimony, we will quote their testimony in detail so that readers can make judgments for themselves.

Penny Angela Letner, a life long native of the Luttrell community, testified that there was a small gathering at the house of her sister, Kathy Parker, near the time of House's trial in 1986. At that time Mr. Muncey confessed that he killed his wife under the following circumstances:

Q. Okay. If you would, just tell His Honor, what happened at that party.

A. I came in — and we call him Bubba — he was sitting there and he was pretty well blistered. I could tell by the way he was talking.

Q. Who do you call Bubba?

A. Hubert Junior. We call him Bubba. We growed up around him. That was just a nickname for us. He was sitting there and he went to crying and was talking about his wife and her death and he was saying that he didn't mean to do it.

MS. LUSTRE: Objection.

THE COURT: Same ruling. Go ahead.

A. He said he didn't mean to do it. That she was "bitching him out" because he didn't take her fishing that night, that he went to the dance instead. He said when he come home that she was still on him pretty heavily "bitching him out" again and that he smacked her and that she fell and hit her head. He said I didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder.

Q. What did you do, when you heard this?

A. When he said that he had to get rid of her, it scared me quite badly. I was 19 year old with a small child. I got out of there immediately. After he made those statements, I was ready to leave there.

Q. Had Little Hube been drinking that evening?

A. From the way he was acting, quite a bit. He was talking kind of stiff tongued like, but it wasn't to the point that I couldn't understand what he was saying.

Q. Was he emotional when he was telling the story?

A. He was crying. He was very upset.

Testimony of Penny Letner, Habeas Hearing Transcript, pp. 28-29, Feb. 1, 1999.

On cross-examination, she explained her reason for coming forward in 1999 to give this testimony:

Q. Did you report this to the police?

A. No. I didn't. I was 19 year old. I was kind of scared. I was frightened, you know. I didn't know how to take it. I figured me being 19 year old they wouldn't listen to anything I had to say.

Q. How is it that you came to give a statement now?

A. They was some people came and started asking questions and I answered their questions truthfully.

Q. What people?

A. It was an investigation that was ongoing for Mr. House.

Q. Do you remember who it was that came to talk to you?

A. Michael Lee was the first gentleman that I spoke with. He was the first one that questioned me.

Q. Why did you not tell Mr. Lee to get lost, essentially?

A. Because it's not right. The gentleman stood right there in my face in front of several people and owned up to doing it. It's not right for a man to be in jail for something he didn't do.

Q. What made it not right 13 years later but okay for the intervening 13 years?

A. There wouldn't nobody listen to me. Finally there was someone willing to talk to me.

Id. at pp. 31-32.

Kathy Parker, Mrs. Letner's sister, also testified as follows about Little Hube's confession and her reasons for coming forward:

Q. Do you have any recollection about anything that he said?

A. Oh, yeah, he said they had been into an argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for it to happen.

Q. Was he intoxicated?

A. He was drinking real heavily, yeah.

Q. Was he emotional?

A. Very.

Q. All right. How very is very?

A. Well, he was crying and just all to pieces.

Q. All right. How long had he been there before he told you about this incident?

A. Maybe 10 or 15 minutes, not real long.

Q. Did he say what they were arguing about?

A. He had wanted to go to a dance or something or another and was wanting to go somewhere else. That is what they got into an argument over.

Q. What did you do when you heard Little Hube say he hit his wife and she died?

A. I freaked out and run him off.

Q. You freaked out?

A. I freaked out and ran him off.

Q. Okay. After the party did you tell anybody about this?

A. Not that night. The next day I went to Union County and tried to talk to some law people and —

Q. Would they listen to you?

A. Went to Union County to the Sheriff's Department. I tried to speak to the Sheriff but he was real busy. He sent me to a deputy. The deputy told me to go upstairs to the courtroom and talk to this guy. I can't remember his name. I never did really get to talk to anybody.

Q. Tried to tell them?

A. Yeah.

Q. Did you talk to your mother about it?

A. A little later on there wasn't a whole lot said about it, but she was the one that took me to the courthouse.

Q. Your mother went with you to the courthouse that day?

A. She drove me. I didn't have a vehicle.

Q. Did you know Carolyn Muncey?

A. Yes, sir.

Q. Are you aware of whether or not Little Hube had ever abused her or beat on her?

A. She was constantly with black eyes and busted mouth.

. . . .

Q. Let me ask you this. You know Little Hube?

A. Yes, sir.

Q. How long you been knowing him?

A. I dated him when I was 14 year old. I will be 42 in June.

Q You have known him a long time?

A. Yes

Q Well, have you had any disagreement with him lately, any arguments, fights?

A. No.

Q. Are you mad at him?

A. No.

Q. Why are you here today?

A. Because I don't think what has happened is right. It needs to be taken care of. An innocent man is in jail.

Q. Do you know the petitioner, Paul House?

A. No, sir.

Q. Ever met him?

A. No, sir.

Testimony of Kathy Parker, Habeas Hearing Transcript, pp. 37-39, Feb. 1, 1999.

Around two months before the murder of Carolyn Muncey, Mr. Muncey also told Hazel Miller, also a life long resident of Luttrell, that he was going "to get rid of that woman one way or the other".

Q: All right. Back prior to the death of Mrs. Carolyn Muncey, did you have occasion to see Little Hube Muncey in your residence?

A. Yes, sir, sure did.

Q. About how long before Mrs. Carolyn Muncey's death was Little Hube in your house?

A. Two, three months, something like that.

Q. What was he there for, if you know?

A. He come tried to get my daughter to go out with him.

Q. What did Little Hube say?

A. He was upset with his wife, that they had had an argument and he said he was going to get rid of that woman one way or the other.

Q. What did you say?

A. Told him he ought to go home to his wife and kids and take care of them.

Q. Did he say anything about his kids?

A. He said his mother told him she was going to help him take care of them.

. . . .

Q. Now, I take it you have known Little Hube for a while?

A. Yes. Basically about all his life.

. . . .

Q. Have you had any disagreements or arguments or fights with Little Hube or any members of his family?

A. No, he has always treated me decent.

Q. Are you all presently on the outs? Are you mad at him or anything?

A. No.

. . . .

THE COURT: All right. Where did this conversation take place?

A. At my kitchen table.

THE COURT: You said he ought to go home to his wife and children?

A. Wife and kids, yes. I thought he should.

THE COURT: What did he say to you?

A. He was going to get rid of her one way or the other. I presume he meant he was going to get a divorce.

Testimony of Hazel Miller, Habeas Hearing Transcript, pp. 47-50, Feb. 1, 1999.

In addition to the confession to Letner and Parker and the "get rid of" statement to Miller, there was additional evidence incriminating Muncey at the habeas hearing. Hubert Muncey insisted he was at the dance until it ended on Saturday night and then went home after midnight to find his wife missing. This testimony is inconsistent with the testimony of Dennis Wallace, the security guard on duty at the dance. He testified:

Q. All right. During that period of time did you see Little Hube Muncey at the dance?

A. Yes, sir, I did.

Q. And during that period of time before the dance was over did you see Little Hube Muncey leave the dance?

A. Yes, sir, I did.

Q. All right. Then subsequent to that, did you see Little Hube Muncey return to the dance?

A. Not that I can recall.

. . . .

Q. Do you remember approximately what time Little Hube Muncey left the dance that evening? When you say saw him leave, before it was over?

A. I would say around 10:00, 10:30, 9:30 to 10:30. I don't know exactly.

Q. You don't recollect now having seen him come back to the dance?

A. No.

Testimony of Dennis Wallace, Habeas Hearing Transcript, pp. 56-57, Feb. 1, 1999.

Mrs. Artie Lawson testified that she is "a good friend" of Little Hube's and that he came to see her Sunday morning to get her to help him establish an alibi for Saturday evening. This conversation on Sunday morning took place several hours before the body was found and before it became clear that Mrs. Muncey was murdered, not just missing. Mrs. Lawson testified:

A. Well, this Little Hube, he come to my house that morning on Sunday morning and he asked me if anybody come to say anything, you know, talk to me, to tell them that he was there at six o'clock.

. . . .

A. He asked me if anyone, you know, come and asked me anything to tell him that he had, that I was at the dance that Saturday night — but I was not. He said that he had eat breakfast down there [at my house] at six o'clock that Sunday morning and he did not.

Testimony of Artie Lawson, Habeas Hearing Transcript, pp. 20-22, February 1, 1999.

Hours before his wife's body was found, Muncey went to Mrs. Lawson and tried to establish an alibi for Saturday night. He in fact had no alibi. He left the dance an hour and a half early and is unable to account for his whereabouts at the very time the county coroner gave as his best estimate as the time of death. Then early the next morning before the body was discovered, he went to Mrs. Lawson in an effort to enlist her help in establishing an alibi.

The evidence of what happened at the Muncey home on Saturday evening further undermines the case against House and further incriminates Muncey. Pamela Luttrell and her husband lived across the road

from the Munceys. Mrs. Luttrell testified that Carolyn Muncey came to her house sometime around 8:00 P.M. on Saturday evening with her children and "stayed an hour or an hour and a half" and "said that Little Hube had gone to dig a grave and he hadn't come back." Testimony of Pamela Luttrell, Addendum No. 4, Vol. II, pp. 632-33. She testified that between 10:00 and 11:00 "within an hour or so after she left" with her children to go back home, Mrs. Luttrell believed she heard Little Hube's car coming back home.

> Q. Now, after she left, did you see or hear anything else that night that drew your attention to outside directly in the vicinity of Carolyn Muncey's home?
>
> A. I heard a car rev its motor as it went down the road.
>
> Q. And you had heard that sound before or you thought you had heard that sound before, hadn't you?
>
> A. Well, I have heard a sound like it.
>
> . . . .
>
> Q. And that was the impression you got that night, wasn't it, that that was Little Hube's car revving up?
>
> A. Yeah, just going by.
>
> Q. And when he'd get to the house there, he would rev up. Is that correct?
>
> A. And then keep going.
>
> Q. Now that would have been somewhere around — after Carolyn had left and before you went to bed. You went to bed within an hour or so after she left?
>
> A. Uh, huh (meaning yes by sound), I was on my way to bed when I heard it.

Id. at pp. 641-42.

Mrs. Luttrell testified that the car was coming from the direction in which Muncey's car would have traveled coming from the dance, from Kitts Road toward Tazewell Pike and "revved up" when he got to the house, as he usually did. Mrs. Luttrell's testimony is consistent with the testimony of Constable Wallace that Muncey left the dance well before it ended. It is inconsistent with Muncey's testimony that he stayed at the dance until it ended. Together with the testimony of Wallace, Mrs. Luttrell's testimony places Muncey at home between 10:00 and 11:00 that evening — the approximate time that the coroner testified that the murder occurred.

In addition, Pamela Luttrell's testimony about what happened later that evening is also completely inconsistent with the theory that House came to the Muncey home on foot during the evening and abducted Carolyn and murdered her. Luttrell testified that Little Hube, along with the two children, Laura and Matt, came to her home at about 1:00 A.M. that evening and told her Carolyn was missing. At that time, Luttrell

questioned Laura in detail about what had happened that evening after she got home from her earlier visit to Luttrell's house. Laura said that she and her younger brother had gone to sleep:

> Q. Mrs. Luttrell, Laura talked with you after she discovered her mother missing?
>
> A. Yes.
>
> Q. Did she tell you whether or not she woke up one time or two times, as far as different people coming to the house asking questions?
>
> A. Well, she said she heard a horn blow, she thought she heard a horn blow, and somebody asked if Bubbie was home and her mama, you know, told them — no. And then she said she didn't know if she went back to sleep or not, but then she heard her mama going down the steps crying and I am not sure if that is when she told me that she heard her mama say — Oh, God, no, not me, or if she told me that the next day, but I do know that she said she heard her mother going down the steps crying.

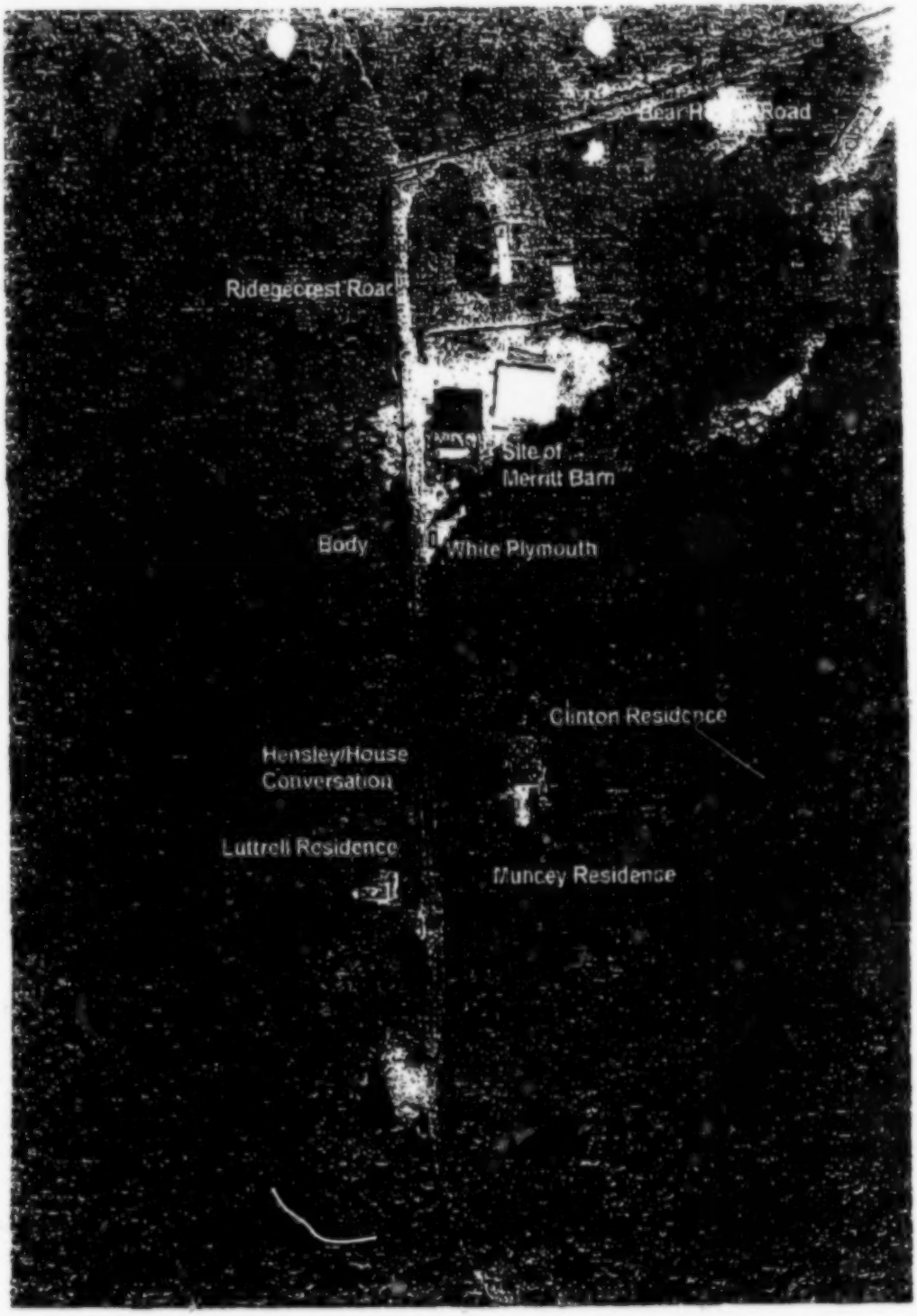
Id. at 658.

Luttrell further testified that Laura told her that the man who asked for "Bubbie" after the horn blew sounded like her grandfather, whom she called "PawPaw." Luttrell said that "Bubbie" was a family name not normally used by others in the community who called Muncey "Little Hube." Laura said nothing in answer to Pamela Luttrell's questions that evening about anyone saying during the evening that Little Hube had been involved in an automobile accident. This evidence seems completely inconsistent with the State's theory that House walked almost two miles at around 10:30 on Saturday evening to the Muncey home where he abducted and murdered Carolyn Muncey. It is clear that House did not have a car that evening, did not blow a car horn, would not have called Little Hube "Bubbie," did not enter the Muncey home, wake up the Muncey children or talk to Carolyn Muncey within the ear shot of the children. In the contemporaneous, immediate conversation between Mrs. Luttrell and Laura, Laura said that she heard a horn blow, someone ask for "Bubbie," who was not there and that person "sounded like PawPaw," who called Little Hube by his family nickname, "Bubbie."

Although it is true, and highly incriminating, that House left his home on foot during a similar time on Saturday evening and returned with bruises and in a disheveled condition, Pam Luttrell's testimony that Little Hube came home around 10:30 and Laura's testimony about the homblowing and the "PawPaw" voice leaves no room for the State's theory that House walked two miles to the Muncey house and murdered Carolyn Muncey and then walked two miles home within a relatively short period of time. The inference that he murdered Carolyn Muncey from the fact that he left home on foot on Saturday evening and returned with bruises and in a disheveled condition cannot be reconciled with Mrs. Luttrell's testimony about when Little Hube came home and Laura's answers to her questions about what happened that evening. Mrs. Luttrell's testimony is consistent with the testimony of Constable Wallace that Mr. Muncey left the dance at about 10:30 P.M. as well as Muncey's confession, his previous threats and brutal treatment of his wife and his attempt to establish an alibi through Mrs. Lawson on Sunday morning.

This particular highly incriminating evidence about House's returning home in a disheveled condition on Saturday night with "blood on his pants," and his semen on the victim's night gown, however,

does go a long way in explaining the jury's capital conviction of House, a stranger in a community with a record of sexual assault, especially when it did not have any of the newly discovered evidence undermining the prosecution's theory of the case. In the absence of the newly discovered evidence, the State's theory seemed convincing. In light of the new evidence, it is no longer tenable. In my view, it is more probable than not that House is innocent of the homicide and that Mr. Muncey killed his wife, as he confessed. Six witnesses — Letner, Parker, Miller, Wallace, Lawson, and Luttrell — now provide either direct or circumstantial evidence that Mr. Muncey killed his wife. He had a motive. The motive attributed to House no longer exists.


Bear H Road
Ridgecrest Road
Site of
Merritt Barn
Body
White Plymouth
Clinton Residence
Hensley/House
Conversation
Luttrell Residence
Muncey Residence

V. The Unreliability of the Hensley Testimony

The preceding map of the area where Carolyn Muncey's body was found is necessary to understand the weakness of the testimony of the one remaining witness, Billy Ray Hensley, who gave highly incriminating evidence at the 1986 trial. The opinion of our court accurately characterizes Hensley's testimony as a series of "inconsistent statements about when and where he saw House on Ridgecrest Road" supposedly "carrying a black rag." The prosecution claimed at the trial that the "black rag" was House's blue shirt which he had lost the night before and had just retrieved after climbing down the embankment where he had left Carolyn Muncey's body.

House explained his presence near Muncey's house at the habeas hearing. He testified that he regarded "Little Hube" and Carolyn Muncey as friends and he heard on Sunday morning that she was missing. He borrowed the car of his girl friend, Donna Turner, and drove down to the area on Ridgecrest Road where he knew they lived. This testimony is corroborated by other witnesses. He missed the driveway which was hidden in trees and undergrowth and turned around and parked the car near Merritt's barn and walked back up about 90 feet and found the driveway and saw that Muncey's car was not at home. He walked back down Ridgecrest Road to his car:

Q. You went back to your car. Did you get in?

A. Yes.

Q. And start driving?

A. I got in, pulled out. I was going to — between Little Hube's and Tazwell Pike there is another dirt road like a dead end.

Q. Somewhere off the chart?

A. Yeah, it is on his side where he lived. It is on that side of the road. It is just a dirt road, dead end. Bill Silvey had told me that people went to drink down there. Donna had told me that people went to drink down there. Donna had told me she had seen him drinking. I thought why not look there. As I was going up there, then Bill Hensley, I guess that is the name, was in the car. I saw him and he was coming towards me. I was going toward him. I waved him over. He stopped.

Q. He was in the little blue car?

A. Right. I asked him if he knew Little Hube. He said he did. Asked him if he had seen him, he said he hadn't, didn't see him around there anywhere.

Testimony of Paul House, Transcript of Habeas Hearing, p. 91, Feb. 3, 1999.

Hensley had also testified at the 1986 trial that House while in his car waved him to stop at that location on Ridgecrest Road and told him he was looking for Little Hube.

The incriminating part of Hensley's testimony at the trial was that as he was coming down Bear Hollow Road approximately 100-150 feet from its intersection with Ridgecrest Road he saw House coming up an embankment where the victim's body was later found:

> Q. Now, you say that as you were coming down, we will call this Bear Hollow Road, just so the jury and everybody will know the roads we are talking about. Before you got to this intersection, before you turned left [onto Ridgecrest Road] to go to Tazewell Pike, you say you saw my client, Mr. House?
>
> A. Yes, sir.
>
> Q. All right. You weren't at the intersection, were you?
>
> A. No, sir.
>
> Q. In fact, you have previously told us you were somewhere between 100 and 150 up from the intersection, weren't you — 100 to 150 feet up from the intersection?
>
> A. Yes, sir.

Testimony of Billy Hensley, Addendum No. 4, Vol. V, p. 717.

After Hensley turned onto Ridgecrest road, he did not see House, according to his testimony:

> Q. From the time that you made your left-hand turn, what was the first thing you saw in relationship to Mr. House or his vehicle?
>
> A. I saw his vehicle.
>
> Q. And at no time after you made your left-hand turn could you say where Mr. House was in relationship to the bank, the side, the road or anywhere in there, is that correct?
>
> A. No sir, I could not.

Id. at 719-20.

There are two serious problems with this testimony. It is directly contrary to the statement Hensley gave to the police on the Sunday evening after the victim's body was found. In that statement he said that he turned left at the intersection and he:

> travelled about 500 feet on Ridgecrest Road when I saw about a '66 or '67 white Plymouth sitting on the left side of Ridgecrest Road and I saw a man, later identified to me as Paul Gregory House enter the roadway from the right-hand side of the road. He was coming up over the bank, and he had a black rag in his hands and he was wiping his hands. I drove on by the man and went to Little Hube's driveway . . .

Statement of Billy Ray Hensley taken by TBI on July 14, 1985, Addendum No. 1, p. 139; *see also* Testimony of Billy Hensley, Addendum No. 4, Vol. V, p. 729.

Hensley testified on cross-examination about the statement:

Q. Did you tell the police that on Sunday at 10:45 p.m., did you talk to them Sunday night, the same night -

A. Oh, yes.

Q. And you gave them that statement, did you not?

A. Yes, sir.

Testimony of Billy Hensley, Addendum No. 4, Vol. V, p. 730.

This statement that Hensley was at the embankment and saw House "coming up" is clearly contrary and unreconcilable with his trial testimony that he saw House 100-150 feet up Bear Hollow Road and did not see him after he made the turn onto Ridgecrest Road. The cross-examination of Hensley revealed not only these contradictions in his statements about where he was when he claimed to see House, as our court's opinion recognizes, but also it revealed the fact that as Hensley drove down Bear Hollow Road that various obstructions like Merritt's barn and trees would have prevented him from seeing anyone in the vicinity of the embankment where he claimed to have seen House. The map itself, the testimony and photographs, show conclusively that Hens' could not have seen House from that location on Bear Hollow Road.

Hensley's contradictory and implausible testimony is the last incriminating straw in the case against House. Like the semen evidence and the blood evidence it is no longer probative. It is a slender reed indeed on which to hang House's conviction and death sentence.

VI. Conclusion

This is a death penalty case based purely on circumstantial evidence in which the prisoner has maintained his innocence during 20 years of incarceration. I would hold that he has easily met the requirements necessary to travel through the gateways of actual innocence of both the death penalty and the homicide by completely disproving the motive for the crime and the aggravator (rape) and through persuasive evidence undermining the main circumstances that gave rise to his conviction (the blood evidence and the Hensley testimony). This body of evidence alone meets both the *Sawyer* standard, that petitioner show by clear and convincing evidence that but for constitutional error at trial, no reasonable juror would have found him eligible for the death penalty and the *Schlup* standard, that petitioner show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. The Court stated in *Schlup* that since gateway claims assert constitutional error at trial, these "convictions may not be entitled to the same degree of respect" as convictions that are the product of error free trials. *Schlup*, 513 U.S. at 316. At a minimum, based on the newly presented evidence we should allow House to pass through the gateway so that his constitutional claims of ineffective assistance of counsel at the guilt and penalty phases of the case become cognizable again. The remedy for passing the gateway test is a remand for further proceedings on the underlying constitutional claim.

In this case, however, I would go further and issue the writ of habeas corpus because the prisoner has affirmatively established a free-standing case of actual innocence. This is that rare and extraordinary case where petitioner has provided "a truly persuasive demonstration of 'actual innocence'" that should free the prisoner immediately. *Herrera*, 506 U.S. at 417. Through extremely persuasive and affirmative evidence that Mr. Muncey killed his wife, House has shown that it is highly probable that he is completely innocent of any wrongdoing whatever. There is no reasonable basis for disbelieving the six witnesses who now incriminate Mr. Muncey as the perpetrator of the crime. The most compelling part of this new testimony involves his confession to the murder in front of two witnesses who have no connection to House and no bias against Mr. Muncey. Furthermore, before his wife's body was even located, he solicited a neighbor to fabricate an alibi on his behalf. He was heard returning home around the time of the murder. And considering his history of domestic violence and his wife's plans to leave him he had a motive to kill. In contrast, there is no evidence of a motive for House. All of the state's physical evidence, both blood and semen, allegedly tying House to the murder, has been effectively rebutted. The new body of evidence as a whole so completely undermines the case against House and establishes a persuasive case against Muncey that, had it been presented at trial, no rational juror could have found evidence sufficient for conviction. The new evidence so completely turns the case around that the proof is no longer constitutionally sufficient to warrant a conviction or imposition of the death penalty. Thus House should be immediately released.

Justice Scalia has referred to the question before us of actual innocence as death penalty's most "embarrassing question," a question he hoped "with any luck we [the Supreme Court] shall avoid ever having to face" in a "convincing" case. *Herrera v. Collins*, 506 U.S. at 428. Justice O'Connor has referred to this "embarrassing question" as a serious current problem: "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." Speech to Women Lawyers in Minnesota, July 2, 2001.

This case and the few empirical studies that we have reinforce Justice O'Connor's view that the system is allowing some innocent defendants to be executed. *See* Radelet & Bedau, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21-179 (1987) (includes tables and summary description of numerous capital cases in which innocent defendants were probably executed); Zimming, *The Contradictions of American Capital Punishment* 149-178 (2003) (summary of the studies, including study by Death Penalty Information Center describing 98 prisoners fully exonerated after time on death row between 1973 and 2001).

High on the list of the causes for mistakes are the kinds of errors we see in this case: the misinterpretation or abuse of scientific evidence, the adverse inferences drawn from the prior record of a defendant, particularly one who is a stranger in the local community, the failure of counsel to uncover (until it is too late) witnesses who could exonerate the defendant, and the existence of one or more other suspects with a motive to commit the offense. Once the initial trial and appeal have occurred, it is clear from the studies that the state, and its officials who have prosecuted, sentenced and reviewed the case, are inclined to persevere in the belief that the state was right all along. They tend to close ranks and resist admission of error. Intelligent citizens who strongly believe in the reliability of the capital sanction are also inclined to persevere in the belief that a case raising the "embarrassing question" will never really arise and close ranks with the state in resisting the admission of error. This case is a good example of how these errors can lead to the execution of a defendant who is actually innocent.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. After reading Judge Norris's majority opinion and Judge Merritt's dissent, I am convinced that we are faced with a real-life murder mystery, an authentic "who-done-it" where the wrong man may be executed. Was Carolyn Muncey killed by her down-the-road neighbor Paul House, or by her husband Hubert Muncey? The evidence at House's state-court trial clearly pointed to him as the perpetrator, highlighted by the physical evidence of the semen and the blood. But the evidence at House's habeas corpus hearing before the district court just as clearly pointed to Hubert Muncey as the guilty party, highlighted by Muncey's confession of guilt to two female acquaintances, the uncontroverted fact that the semen found on his wife's clothing turned out to be his own, and the considerable doubt cast on how the victim's blood came to appear on House's blue jeans.

At the end of the day, I am in grave doubt as to which of the above two suspects murdered Carolyn Muncey. I am also puzzled as to why more of my colleagues are not similarly in doubt after evaluating the well-written but diametrically opposed opinions by Judges Norris and Merritt. Be that as it may, the question becomes what is a federal judge to do when faced with such grave doubt? The United States Supreme Court, fortunately, has provided an answer in the case of *O'Neal v. McAninch*, 513 US. 432 (1995), a case that incidentally arose out of the Sixth Circuit. Its key holding is as follows:

> We repeat our conclusion: When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict," that error is not harmless. And, the petitioner must win.

Id. at 436.

The Court in *O'Neal* also defined the term "grave doubt," stating that "[b]y 'grave doubt' we mean that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* at 435. Finally, the Court noted that

> our conclusion is consistent with the basic purposes underlying the writ of habeas corpus. As we have said, we are dealing here with an error of constitutional dimension—the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person.

Id. at 442.

The risk of an unreliable trial outcome is precisely what we are dealing with in the case before us. For the reasons well-documented in Judge Merritt's dissenting opinion, I believe that House has passed through the *Schlup* "actual innocence" gateway and is entitled to our consideration of his constitutional claims on their merits. On the other hand, I disagree with Judge Merritt's conclusion that the proof in favor of House is so strong that we should issue an unconditional writ of habeas corpus.

The proper disposition of this case, in my opinion, is to issue a conditional writ that would free House unless he is provided a new trial by the state of Tennessee. *See Castleberry v. Brigano*, 349 F.3d

286, 294 (6th Cir. 2003) (granting a conditional writ of habeas corpus to vacate the defendant's conviction and sentence unless the state commenced a new trial against the defendant within 90 days). A new trial would allow the jury to assess House's guilt or innocence free from the erroneous introduction of the semen evidence, with full knowledge of the controversy surrounding the blood evidence, and with the benefit of the testimony implicating Hubert Muncey. Under circumstances where we face the execution of a man who might well be innocent, I believe that our system of justice demands no less.

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ELECTRONIC CITATION: 2002 FED App. 0406P (6th Cir.)

File Name: 02a0406p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Paul Gregory House, *Petitioner-Appellant,* *v.* Ricky Bell, Warden, *Respondent-Appellee.*	No. 00-6136

Appeal from the United States District Court

for the Eastern District of Tennessee at Knoxville.

No. 96-00883--James H. Jarvis, District Judge.

Argued: June 12, 2002

Decided and Filed: November 22, 2002

Before: MARTIN, Chief Circuit Judge; MERRITT, BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, Michael E. Moore, Paul G. Summers, TENNESSEE ATTORNEY GENERAL'S OFFICE, CIVIL LITIGATION & STATE SERVICES DIVISION, Nashville, Tennessee, for Appellee.

MERRITT, J., delivered the opinion of the court, in which MARTIN, C. J., DAUGHTREY, MOORE, COLE, and CLAY, JJ., joined. BOGGS, J. (pp. 22-35), delivered a separate dissenting opinion, in which NORRIS, SILER, and BATCHELDER, JJ., joined. GILMAN, J. (p. 36-37), also delivered a separate dissenting opinion.

OPINION

MERRITT, Circuit Judge. In this death penalty case from Tennessee, the habeas petitioner presents a strong claim of "actual innocence" or "miscarriage of justice," as we will outline below. The Supreme Court has assumed that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant habeas relief *if there were no state avenue open to process such a claim.*" *Schlup v. Delo* 513 U.S. 298, 314 n. 28 (1995)(*quoting Herrera v. Collins*, 506 U.S. 390, 417 (1993)(O'Connor, J., concurring)(emphasis added). Justice O'Connor has referred to such an execution as a "constitutionally intolerable event." 506 U.S. 417. As a matter of traditional comity and respect for our colleagues on the Supreme Court of Tennessee, we therefore certify certain questions to that Court in order to ascertain whether there remains a "state avenue open to process such a claim" in this case. In both capital and non-capital habeas cases, the United States Supreme Court has certified in similar situations important questions of state law which "would assist in framing the precise federal constitutional issues presented." *Zant v. Stephens*, 462 U.S. 862, 870 (1983). For a recent certification by the Supreme Court to the Supreme Court of Arizona in a death case, *see Stewart v. Smith*, 534 U.S. 157 (2001). We will follow that pattern of certification in this case.

The petitioner, Paul House, has been sentenced to death on the basis of a set of facts that now turns out to be false in significant respects. The prosecution's theory of the case, as argued and no doubt as accepted by the jury, was that House raped the victim and then concealed the rape by murdering her. DNA evidence has now conclusively shown that the semen introduced at House's trial to prove his sexual assault was not his semen but rather the semen of the victim's husband. In addition, two other significant events have occurred since the death penalty was imposed to cast doubt on the accuracy of the jury's verdict: first, the testimony of two independent witnesses that the victim's husband admitted that he, not the defendant, killed his wife; and second, the Assistant Chief Medical Examiner of the State of Tennessee has now concluded that the blood found on House's blue jeans was identical to the victim's blood in the vials obtained during autopsy and not consistent with blood that came from the victim at the time of the murder. As the Tennessee Supreme Court explained in reviewing House's conviction, House "never confessed to any part in the homicide, and the testimony linking him to it was circumstantial." *State v. House*, 743 S.W.2d 141, 143 (1987).

I.

A. House's Trial

The dead body of Carolyn Muncey, a resident of rural Union County, Tennessee, was found on the afternoon of July 14, 1985, lying partially concealed in a brush pile at the bottom of a wooded embankment within 100 yards of her home. The previous evening, Mrs. Muncey and her two children had visited a neighbor and left at about 9:30 p.m. to return home. Muncey's older child, ten year old Laura,(1) testified at trial that she was awakened late that evening by the sound of a car horn. She testified that she heard a deep voice that sounded like her grandfather asking about her father. The same voice told her mother that her father had been in a car wreck near the creek. Laura further stated that she heard her mother sobbing or crying as she left the house. When her mother did not return, the two children went to look for her at neighboring homes. Not finding her, they returned home and

waited until their father Hubert Muncey arrived. Discovering that his wife was missing, he took the children back to the home of the neighbor they had visited earlier and then called for members of his family to look for his wife.

When the body of Carolyn Muncey was discovered the next afternoon, she was dressed in her nightgown, housecoat, and underclothing. Her body had significant bruises, and there were abrasions indicating a physical struggle. There was also evidence of attempted strangulation. According to Dr. Carabia, a forensic pathologist, a blow to her left forehead resulting in a concussion and hemorrhage to the right side of her brain caused her death. Carabia also testified at trial that the victim was probably knocked unconscious by the blow to the head, and died within an hour or two. He estimated the time of her death as between 9 and 11 p.m. on Saturday, July 13, but emphasized that it was a rough estimate.

The testimonial evidence presented at trial implicated both the defendant and the victim's husband, Hubert Muncey. Muncey's alibi for the night of July 13 was that he spent the evening at the weekly C & C Recreation Center community dance and did not leave until midnight. Several individuals confirmed that he was at the dance, but no one confirmed his presence there late in the evening. The following morning Muncey went to the house of a neighbor, Artie Lawson, and asked her to lie for him as an alibi witness and say that she had seen him at the dance around midnight. The record shows that at the time of the murder Mrs. Muncey and her husband had been having marital difficulties. He had been physically abusing her and she had been contemplating leaving him. Muncey's history of abusing his wife was well-known within the local community, and he acknowledged that he "smacked" his wife on more than one occasion.

The testimonial evidence presented at trial also implicated House. There was evidence showing that he was acquainted with Mr. and Mrs. Muncey and had been with them socially on a few occasions, but there was no evidence to indicate that House was aware of the Muncey's marital situation, or that there had been any previous romantic or sexual relationship between him and the victim.

In addition, on the day following the victim's disappearance, Billy Ray Hensley, a close friend of Hubert Muncey, saw Paul House on Ridgecrest Road near the site where Mrs. Muncey's body was later found concealed in the underbrush. According to Hensley, House emerged from the embankment where the body was found and was wiping his hands with a dark cloth. Hensley spoke briefly with House and left the scene. Later Hensley and a friend returned to the scene, and went to the point where he had purportedly seen House emerge from the embankment. Looking down the bank, they found the partially concealed body of Mrs. Muncey.

House admitted that he had been in the area but denied that he had seen the body of Mrs. Muncey or had any knowledge of its presence. In addition, the dark rag which he had been using when first seen was never produced. It was the theory of the State, however, that this was a dark tank top which House was shown to have been wearing on the previous evening. Hensley's testimony that he saw House emerging from the embankment was partially discredited at trial by his own statement that he saw House from about 500 feet down Ridgecrest Road, a location where the defense proved by photographic evidence that it would have been impossible for House to have been seen down the embankment.

In the days following the homicide, House gave two statements to investigating officers in which he denied being involved in the homicide. In both of these statements he stated that he had been at the trailer of his girlfriend Donna Turner the entire evening of July 13 and that he had not left until next afternoon when he went to look for Hubert Muncey after learning of the disappearance of the latter's wife. Ms. Turner initially corroborated his alibi, but later modified her testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. She stated that he did not take her automobile.(2) When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing either his blue tank top or his tennis shoes. The shoes were later

found in an area different from the place where House told her he had lost them, but did not have blood stains on them. House told Ms. Turner that he had thrown away the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him.

At trial, three key pieces of physical evidence implicated House. First, House had numerous scratches and bruises on his arms, hands and body, with an especially significant bruise on the knuckle of his right ring finger. House explained that these injuries had been sustained innocently earlier during the prior week, but when Ms. Turner was called as a witness, she said that she had not observed them prior to the evening of July 13.

Second, investigators discovered a pair of blue jeans that Paul House had been wearing on the night of the murder, in the bottom of the clothes hamper at Ms. Turner's trailer. These trousers were later determined to be bloodstained, and the State produced scientific evidence that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with House's own blood. Scientific tests also showed that the fibers found on the clothing of the victim were blue jean fibers. Third, investigators found spots of semen stain on the victim's nightgown and underclothing. Scientific tests showed that the semen came from a so-called "secretor," a class of males whose semen contains evidence of their blood type. In addition, the State introduced evidence that Paul House was a "secretor" and that the semen found on the victim's underclothes was of the same blood type as House.

The State's theory at trial was that House had lured the victim out of her house late at night with the intention of raping her and murdered her in the process. To support their theory, the State introduced into evidence and then emphasized the semen evidence in order to promote a jury inference that House had raped her. At trial, in its closing rebuttal, the State presented the following argument concerning House's motive:

> Now you may have an idea why he did it. The evidence at the scene which seemed to suggest that he was subjecting the lady to some kind of indignity, why would you get a lady out of her house, late at night, in her night clothes, under the trick that her husband has had a wreck down by the creek? Why is it that you want to get her down by the creek?.... [I]t is either to keep her from telling what you have done to her, or it is that you are trying to get her to do something that she nor any mother on that road would want to do with Mr. House .... and you kill her because of her resistance.

Tr. Trans. Vol. IX, p. 1302-03. The semen evidence fit the State's theory of the murder. In light of the State's theory and the testimonial and physical evidence, the jury convicted Paul House of first-degree murder and sentenced him to death. Citing the prosecution's claim that the evidence showed that "on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant," the Tennessee Supreme Court upheld House's conviction and the imposition of the death penalty. 743 S.W.2d 143.

B. Newly Discovered Evidence

At the habeas hearing in federal court, House presented three important pieces of newly discovered evidence not considered by the jury at trial. First, he showed that he did not rape the victim. At the habeas hearing, DNA expert Lisa Calandro offered undisputed evidence that eliminated House as a potential donor of the semen. Ms. Calandro concluded that, based on the DNA of the semen, the victim's husband was the donor of the semen. In addition, there was no other physical evidence supporting rape or attempted rape of the victim. There was no evidence of forced penetration, the victim's clothing was not ripped or removed, and there were no bruises on the victim indicating an attempted rape. The State seems now to concede these facts.

Second, there are two independent accounts of Hubert Muncey's confessing to killing his wife that were not considered by a jury, and the statement of a third witness that Muncey had threatened to kill

his wife. At the habeas trial, defense witnesses Kathy Parker and Penny Letner both testified that in the days after his wife's death, Hubert Muncey confessed to accidentally killing his wife. They both stated that he was crying about his wife and her death saying that he didn't mean to do it. According to the witnesses, Muncey had come home from the dance and gotten into an argument with his wife. He said that he "smacked her and that she fell and hit her head." Adding further credence to their testimony was the statement of Hazel Miller at the habeas trial that Mr. Muncey told her that he was going to get rid of his wife a few months before her death.

Third, the blood evidence introduced at trial has been called into question by new evidence presented by the defendant at the habeas hearing. Four vials of blood were taken from the victim when an autopsy was performed after her death. The vials were sent to the FBI lab for analysis. Defense expert Dr. Cleland Blake, Assistant Chief Medical Examiner for the State of Tennessee, reached the conclusion that the blood on House's jeans came from one of the vials of blood taken from the victim's body, not from her body at the time of the murder. His conclusion was based on his theory of enzymatic degradation. When FBI Agent Paul Bigbee initially tested the blood from Ms. Muncey's body and the blood found on Paul House's jeans, he found a clear match, revealing that the blood on his jeans belonged to the victim. Blake, however, found that upon closer examination, there was consistency in enzyme degradation between the sample from Ms. Muncey's body and the five samples from the jeans.

Blake's testimony is as follows: enzymes are proteins which have a complex molecular structure. There are many types of enzymes which act as catalysts for cellular activity. Their fragile structure is only maintained by the proper environment provided in the human body. Over time, the chemical bonds of enzymes break and they lose their structure and shape and become inactive, i.e., they degrade and are said to be "denatured." Agent Bigbee performed tests on the victim's blood and the five samples from the defendant's jeans. Agent Bigbee looked for the presence of various enzymes – to see whether they had denatured or not – in the blood from the test. Of the ten enzymes tested, six had conclusive results. All six enzymes matched. Analyzing the results of Bigbee's tests, Dr. Blake concluded that the enzymes in the blood on the jeans changed shape and degraded at the same rate as the blood in the sample taken from the victim's body after her death. Because they degraded at the same rate despite being in two different media, it appears that the enzymes came from the same sample, that is, the blood on the defendant's jeans came from the one of the vials of blood taken from the victim. The blood on the jeans did not come from the victim at the time that she was assaulted.

In addition to the similarity in enzymatic activity, House presented evidence suggesting that the sample in the vials of blood may have been tampered with or spilled onto the blue jeans. As Dr. Blake noted, there was no unbroken chain of custody. Larry Johnson, an expert in crime scene investigation, similarly stated that "the packaging of the materials in the case did not meet professional standards." House also showed that there was blood missing from the sample taken - one of the four vials was empty and another is only half-full despite Agent Bigbee's testimony that he used only one-fourth of a vial in performing his tests at the FBI lab. House then introduced the photograph of the styrofoam container clearly showing that blood spilled in the container and that the tape on the container was mysteriously cut and retaped contrary to standard procedure. The label on the container said it contained the semen and the blood evidence, but it turned out that the semen evidence was shipped separately. Also, House noted that the location of the blood spots on the jeans was odd. The five spots were found on the outside left leg, on the inside left thigh, on the *inside* right pocket, outside the right pocket, and on the right cuff, respectively.

The testimony of the State's blood spatter expert Pauline Sutton also raised questions as to whether the jeans were tampered with. She noted that some of the blood stains were mixed with mud. The National Weather Service records show that it had not rained for three days prior to the murder, and photographs of the crime scene showed no mud present. Lastly, there was no mud on the victim's nightgown. All of this evidence raises serious questions as to how the mud got on the jeans.

C. Aggravating Factors

At sentencing, the jury found that the State proved three of the statutory aggravating factors. They were (1) the homicide was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; (2) it was committed while House was committing or attempting to commit or fleeing from the commission of rape or kidnapping; and (3) House had previously been convicted of a felony involving the use or threat of violence to the person. T.C.A. §§ 39-13-204(i)(5), (7), and (2).

The undisputed DNA evidence that shows that House did not rape the victim seriously affects the first and second aggravating factors. The first aggravating factor states that the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. The primary evidence for this aggravator that could constitute "torture" beyond the killing was the State's rape evidence.

The second aggravating factor alleged is that the crime was committed while House was committing or attempting to commit or fleeing from the commission of rape or kidnapping. In the jury instructions, the state trial court defined kidnapping as "the offense of forcibly or unlawfully confining, inveigling, enticing away another with the intent of causing him to be secretly confined or imprisoned against his will." Tr. Trans. at 1449. Although House purportedly lured the victim out of her house, her body was found within yards of her doorstep the following day. Outside of the evidence of sexual assault, the evidence that House confined or imprisoned the victim is remote. Thus, this aggravator is also undermined by the new DNA evidence.

In proving the third aggravating factor at the sentencing phase of the defendant's trial, the State introduced House's prior conviction by putting the defendant's parole officer, Guy Marney, on the stand. He testified that House was on parole, having been convicted in Utah of aggravated sexual assault. Marney also noted that the defendant's sentence had been from five years to life. On direct appeal, the Tennessee Supreme Court found that the admission of this evidence was error:

> In proving the prior conviction of the appellant at the sentencing hearing, the State adduced evidence as to the extent of his sentence and the fact that he was on parole. The State concedes that this testimony was irrelevant to any statutory aggravating circumstance or to any mitigating factor and that error was, therefore, committed. Under all of the circumstances, however, in our opinion the error was harmless beyond a reasonable doubt. As previously stated, three aggravating circumstances were shown, and there was almost minimal proof of any mitigating factor, so that any error with respect to this issue, in our opinion, could not have affirmatively affected the results of the hearing.

State v. House, 743 S.W.2d 141, 147 (Tenn. 1987). Thus, the Court's opinion appears to preclude the use of this aggravator but allows the judgment to stand based on the rape evidence which was sufficient to establish the other two aggravators. The State had argued at its closing at sentencing that House's behavior was repetitive, having committed a prior sexual assault followed by the rape and murder of the victim:

And I say to you that if a person who does that [rapes and kills the victim], having been shown to have committed a violent crime, an aggravated sexual assault previously, then that is a person that in order to protect ourselves, we must consider the death penalty.

Tr. Trans. at 1437.

D. The Effect of the DNA Evidence on the Element of "Malice Aforethought"

In addition to the questions raised by the DNA evidence concerning the aggravating factors, the DNA evidence raises a serious issue as to whether Paul House is guilty of first degree murder. At the

time of the defendant's trial, Tennessee law defined murder as an unlawful killing "with malice aforethought, either express or implied." Tenn.Code Ann. §§ 39-2-201 (1982) [repealed]. If the murder was "perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious and premeditated killing" or was committed during the commission of a felony, the killing constituted first degree murder. *Id.* at §§ 39-2-202(a) [repealed]. All other murders were deemed second degree murder. *Id.* at §§ 39-2-211(a) [repealed]. The Tennessee Supreme Court further explained the elements of first-degree murder as follows:

> To convict a defendant of murder in the first degree, there must be an evidentiary basis for a conclusion by the jury that the killing was willful, deliberate, malicious and premeditated. All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. And, if a weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, malice will be presumed from the use of the weapon. Deliberation and premeditation involve a prior intention or design on the part of the defendant to kill, however short the interval between the plan and its execution. It is sufficient if only a moment of time elapses between the plan and its execution as long as the jury can conclude from the evidence that there was some appreciable interval, however small. And, whether premeditation is present in a given case is a question of fact to be determined by the jury from all circumstances of the case.

Sikes v. State, 524 S.W.2d 483, 485 (Tenn.1975)(citations omitted). Thus, to convict a defendant of first-degree murder, the State must prove beyond a reasonable doubt that the defendant killed the victim, and did so with malice aforethought, premeditation, and deliberateness. *Id.*

The Tennessee Supreme Court has made it clear that when a jury makes "a determination of culpable mental states, such as premeditation ..., [it] must [often] be inferentially made from the circumstances surrounding the killing." *State v. Hall*, 958 S.W.2d 679, 704 (Tenn.1997). However, circumstantial evidence of a defendant's state of mind will not support a jury verdict of premeditated murder unless the proof of premeditation and deliberation is "so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *State v. Crawford*, 225 Tenn. 478, 470 S.W.2d 610, 612 (1971). Motive directly impacts the question of premeditation and the defendant's state of mind. *See, e.g., State v. Schafer*, 973 S.W.2d 269, 273 (Tenn. Crim. App. 1997)(holding that the State had failed to prove premeditation because of its failure to prove motive).

The State argued at closing that the defendant's motive was to rape the victim and murder her in an attempt to conceal the rape. In disproving the rape, the DNA evidence introduced on habeas also undermines the State's only proffered motive for the crime and its stated basis for establishing the element of premeditation or malice aforethought necessary to prove first-degree murder. This evidence together with the new evidence of the husband's confessions and Blake's expert testimony appears to raise for House a strong claim of actual innocence of murder in the first degree.

II.

Under current federal death penalty jurisprudence, a defendant's eligibility for the death penalty depends on a combination of federal and state law. One may not be condemned to death under the Eighth Amendment for simple murder. To survive Eighth Amendment scrutiny, there must be a "meaningful basis for distinguishing the few cases in which [death is to be] imposed from the many cases in which it [is] not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972)(White, J., concurring).

This means that where simple murder is committed without any valid "aggravating" or similar class narrowing circumstance, death is cruel and unusual punishment. In order to be generally death eligible under the Eighth Amendment, the jury must find the defendant guilty of a valid "aggravating circumstance" that serves to distinguish those murderers who may deserve the death penalty from

those who do not and thus "circumscribe the class of persons eligible for the death penalty." *See Barclay v. Florida*, 463 U.S. 939, 952-56 (1983); *Zant v. Stephens*, 462 U.S. 862, 877-78 (1983).

Without such a circumstance which renders the crime more culpable, a jury is left without sufficiently clear and definite principles to insure that the death penalty is not arbitrarily and inconsistently applied in violation of the broad standards limiting the death penalty first laid down in *Furman*. The guiding principle that emerged from *Furman* was that States were required to channel the discretion of sentencing juries in order to avoid a system in which the death penalty would be imposed in a "wanto[n]" and "freakis[h]" manner. *Id.*, at 310 (Stewart, J., concurring).

Since *Furman*, the Supreme Court has consistently insisted that there is a fundamental constitutional requirement of channeling and limiting of the sentencer's discretion in imposing the death penalty in order to minimize sufficiently the risk of wholly arbitrary and capricious action. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 189, 206- 207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *id.*, at 220-222 (White, J., concurring in judgment); *Spaziano v. Florida*, 468 U.S. 447, 462 (1984); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988).

In its most recent term, the Supreme Court held that "aggravating circumstances," the narrowing mechanism chosen by the State imposing the death penalty, are elements of the crime. *See Ring v. Arizona*, 536 U.S. __, 122 S.Ct. 2428 (2002). As a result, several important constitutional protections attach: "the proscription of any deprivation of liberty without 'due process of law' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6." *United States v. Apprendi*, 530 U.S. 466, 476-77 (2000). "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* at 477 (*quoting United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

The Supreme Court has established that the aggravating elements of the crime that make the accused eligible for the death penalty, like the elements of the underlying crime of murder, depend on state law. *See Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)(holding that to be found actually innocent of the death penalty, a petitioner must show "by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable state law"). Tennessee law is clear that to be eligible for the death penalty as an initial matter, a jury must unanimously determine that one or more statutory aggravating circumstances have been proven by the State beyond a reasonable doubt. T.C.A. §39-13-204(g) (2002). Here, the jury found three. As explained above, new DNA evidence disproves the first two aggravating factors, and the Supreme Court of Tennessee held that the presentation of the third aggravating factor to the jury constituted prejudicial error.

The first unresolved question of state law is whether a defendant whose sole remaining aggravating factor was introduced in an erroneous manner loses his state defined eligibility for the death penalty based on that sentencing and requires a new sentencing hearing. In other words, in light of the United States Supreme Court's emphasis on the important constitutional protections accorded to a defendant to have aggravating circumstances proven to a jury beyond a reasonable doubt, does Tennessee law require that a defendant be resentenced where the only aggravating factor was presented in an erroneous and prejudicial manner? We also ask the Supreme Court of Tennessee whether, in light of the new DNA evidence and the error in the presentation of the third aggravating factor to the jury, Tennessee law requires that a jury reweigh the aggravating and mitigating circumstances in this case.

On the question of whether the defendant has made a "truly persuasive demonstration of actual innocence" of first degree murder, there arises a third unresolved question of state law. *Schlup*, 513 U.S. at 314, n. 28. As explained *supra*, the new DNA evidence disproves the State's theory that the defendant murdered the victim in the commission of a sexual assault. In light of the Tennessee Supreme Court's extensive jurisprudence on "malice aforethought," we ask whether the DNA

evidence, together with other newly discovered evidence of actual innocence, create a sufficient doubt that House is guilty of first degree murder that Tennessee law would require a new trial on the underlying murder charge.

Thus, we ask these questions, in light of *Schlup v. Delo*, *supra*, in order to ascertain whether there remains a "state avenue open to process [petitioner's] claim" of actual innocence in this case.

ORDER CERTIFYING QUESTIONS TO THE SUPREME COURT OF TENNESSEE

Having now set out in detail the factual and legal basis of House's claim of actual innocence of the aggravating elements and of first degree murder and demonstrated that each are framed by rules of Tennessee state law, we respectfully certify to the Supreme Court of Tennessee under its certification rules,(3) the following two questions respecting the aggravating elements found by the jury and a third question concerning the underlying murder conviction:

(1) When the Tennessee Supreme Court finds error in the presentation of an aggravating factor to a jury, and the remaining aggravating factors are disproven by new DNA evidence, does a defendant lose his current eligibility for the death penalty under state law and require a new sentencing hearing?

(2) If under Tennessee law a jury must weigh the aggravating and mitigating circumstances, and the Supreme Court of Tennessee on review then proceeds to consider the reasonableness of the weighing process, does the Court's review process now permit it to remedy any error in the weighing process by the jury in light of newly discovered evidence?

We also respectfully certify to the Supreme Court of Tennessee one question concerning the "malice aforethought" element of the first degree murder conviction:

(3) Does Tennessee law require a new trial when newly discovered evidence of actual innocence, a significant part of which is in the form of DNA evidence which *could not be discovered* at the time of trial, creates a serious question or doubt that the defendant is guilty of first degree murder?

In accordance with Rule 23 of the Supreme Court of Tennessee, we provide the following required information:

(A) Style of the Case: *House v. Bell*, No. 00-6136

(B) Facts and questions of law: the facts out of which the questions of state law arise, and the questions themselves have been explained *supra*.

(C) The names of the parties: Paul Gregory House and Ricky Bell, Warden

(D) The names, addresses, and telephone numbers of counsel for both parties:

(1) Counsel for Paul House: Stephen M. Kissinger, Assistant Federal Community Defender, Federal Defender Services of Eastern Tennessee, Inc., 530 S. Gay St., Suite 900, Knoxville, TN 37902, 865-637-7979.

(2) Counsel for Ricky Bell: Paul G. Summers, Attorney General & Reporter; Michael E. Moore, Solicitor General; Alice B. Lustre, Assistant Attorney General; Glenn R. Pruden, Senior Counsel, Criminal Justice Division, P.O. Box 20207, Nashville, TN 37202, 615-741-3487.

(E) Designation of one of the parties as the moving party:

The Moving party (Petitioner): Paul House

The Adverse party (Respondent): Ricky Bell, Warden

Accordingly, it is ORDERED that the above questions be certified to the Tennessee Supreme Court and forwarded to the clerk of the Tennessee Supreme Court under Rule 23, Rules of S.Ct. of Tennessee.

III. Response to Dissenting Opinion

Our dissenting colleagues' opinion makes two basic points repeatedly: (1) although the new evidence "might convince some, or even most, reasonable jurors that Paul House is actually innocent" (page 23), some juror might still conclude, even in light of the new evidence, that Paul House should be executed, and (2) the certification of questions to the Tennessee Supreme Court is merely a "novel diversionary process" that will delay House's execution.

With respect to the first point, our dissenting colleagues misunderstand Justice Stevens' opinion for the Court in *Schlup v. Delo*, 513 U.S. 298 (1995). In that case, the Court rejected the old narrow standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), and *Sawyer v. Whitley*, 505 U.S. 333 (1992), in actual innocence cases like this one presenting new evidence. That is why Chief Justice Rehnquist and Justice Scalia dissented. Our dissenting colleagues in this case would apply the old standard of the sufficiency of the evidence at trial to new evidence that indicates that the capital defendant may be legally innocent.

In *Schlup*, it turned out that the Court's reversal saved Schlup's life. He was found to be innocent of the crime. Had the Court followed the standard proposed by our dissenting colleagues, the Eighth Circuit would have been affirmed, there would have been no "delay" to review the new evidence and Schlup would have been executed. For a description of Lloyd Schlup's case and the cases of numerous other condemned prisoners, whose convictions were set aside after numerous levels of trial and appellate review were exhausted, *see* James S. Liebman, et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, 24-35 & notes 128-132 (Feb. 11, 2002).

The question is not, as our dissenting colleagues seem to believe, whether the trial evidence with the new information remains sufficient for a juror to vote to convict but rather "if they [the new statements] . . . are true," whether "a juror, conscientiously following the judge's instruction requiring proof beyond a reasonable doubt, would vote to convict." 513 U.S. at 331. This is far different from the test used by our dissenting colleagues -- the sufficiency of the evidence in the trial record. The dissent looks to whether there is evidence that could have supported a jury's decision to convict, regardless of the new evidence. But *Schlup* looks instead to the "likely behavior of the trier of fact" – what a conscientious juror *would* do given all the evidence. Justice Stevens specifically holds, in reversing the Eighth Circuit, that "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Id.*(4)

With respect to the question of "delay," it is better to be safe than sorry, as we learned after Lloyd Schlup's case was reversed. We must remember, as members of the Supreme Court have advised us, that "death is different -- that "[t]he taking of life is irrevocable," so that "[i]t is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights," *Reid v. Covert*, 354 U.S. 1, 45-46 (1957), (Frankfurter, J. concurring), and that "[i]n death cases doubts . . . should be resolved in favor of the accused," *Andres v. United States*, 333 U.S. 740, 752 (1948), and that "[t]he Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 & n.9 (1983).

We must take seriously the Supreme Court's admonition in *Schlup*, quoted above, that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant habeas relief *if there were no state avenue open to process such a claim*," 513 U.S. 298, 314 n. 28. In such cases as this one, it is not obvious what avenues of relief are open, and we are not inclined to agree with our dissenting colleagues that the door should be closed and the man executed without asking any questions.

One further error in the dissenting opinion should be noted. The dissenters say that all the questions before us are "fully exhausted in the state courts." This is simply wrong. The DNA semen evidence has not been presented to state courts. Neither has the husband's confessions nor the conclusion of the Chief Medical Examiner for the State of Tennessee that the blood found on House's pants leaked from vials of blood from the autopsy of the victim. Had the Tennessee Supreme Court considered this evidence and decided that no avenues of relief are open in the courts of Tennessee, we would not be certifying the case to it.

DISSENT

BOGGS, Circuit Judge, dissenting. In today's opinion, the court does *not* answer the one question that should be before it: "Would some reasonable juror believe that Paul House committed first degree murder and should be subject to the death penalty?" *See Schlup v. Delo*, 513 U.S. 298, 329 (1995). A negative conclusion must be supported by "new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." *Id.* at 324. Since the court does not decide that question today (though it certainly strongly hints at an answer), I have no affirmative case to rebut. As I will show below, if that question were squarely decided today, one would have to truncate drastically the class of "reasonable jurors" to produce a negative answer.

Instead, the court gives the petitioner what he is seeking, a delay in execution, by a tactic that, if valid and sanctioned by the Supreme Court, would allow any court of appeals to duck its responsibility to decide cases, in favor of returning them to state courts through a process that is without precedent.

The court's opinion attempts to find a precedent for such certification in cases such as *Stewart v. Smith*, 534 U.S. 157 (2001) and *Zant v. Stephens*, 462 U.S. 862, 870 (1983). These cases are not really on point; they involved situations in which the Supreme Court sought to understand more precisely the import of a challenged state law that had been interpreted by federal courts of appeals. In our case, the certified questions ask to have light shed on an issue already before us, whether "there [is] no state avenue open to process such a claim [of actual innocence]." *See Schlup*, 534 U.S. at 314 n.28 (*quoting Herrera v. Collins*, 506 U.S. 390, 417 (1988) (O'Connor, J., concurring)). *Ibid.* Apparently a federal court would not be warranted in granting habeas relief, even making all the other necessary assumptions, if such an avenue were open. However, those cases in no way open the door for a court of appeals, having squarely before it a claim (ineffective assistance of counsel) that is fully exhausted in the state courts, to ask a state court for a rumination on this question.

If the Tennessee Supreme Court answered this question, what would the result be? If it firmly states that there is *no* state avenue open, then we simply return to our current position, many months or years down the road, with our court forced at that point to confront the question that is actually before it now. On the other hand, if it declares that there *is* an avenue open to process such a claim, then I would presume that habeas should be denied on that basis alone, again many months down the road.

This would presumably raise the odd (and unseemly) spectacle of this court denying a habeas petition and the prisoner proceeding toward execution, with only the possibility (which he would have always had anyway) of some last-minute intervention by the state courts. *See Workman v. State*, 41 S.W.3d 100 (Tenn. 2001).

In reality, the court's decision this day seems primarily to be a fishing expedition, undertaken in the hope that the Tennessee Supreme Court will take us off the hook by re-assuming control of the case, under the majority's gentle guidance, or in the hope that we will, at a minimum, inject a significant additional amount of delay. Because I believe that we have squarely presented before us a question that we can answer, I respectfully dissent.

I

Judge Merritt has written an able argument on petitioner's behalf. That argument might convince some, or even most, reasonable jurors that Paul House is actually innocent or should not be convicted. It would not, however, be so compelling that it is more likely than not that no reasonable juror would convict and thus, under established law, it should not avail Mr. House. The court focuses on three new items that would allegedly be so powerful that the *Schlup* standard would be met. I will deal with each briefly.

1. *The semen on the victim's clothing.*

At trial, truthful evidence was presented showing that there were spots of semen on the victim's nightgown and underclothing (though none on or in her body) that were consistent with the physical characteristics of defendant House, though no claim was made that this proved identity. Nor, contrary to the majority's claim, did the State affirmatively contend that he had raped her. At most, as the quotation at page 7 of the majority opinion shows, the state argued that tricking a woman out of bed in the middle of the night and getting her down into a wooden ravine was consistent with "trying to get her to do something that she . . . would [not] want to do with Mr. House. . . ." Defense counsel noted at trial that the semen was equally consistent with the physical characteristics of the victim's husband who was, even then, an alternate suspect under the defense's theory.

2. *Muncey "confessions."*

At the habeas hearing, two women testified that Hubert Muncey confessed to killing his wife. These are statements made many years after the offense, by two women who knew the petitioner, that tend to exculpate him. The women were found not to be credible by the federal district judge. They were available to the defense at the time of trial, but either were not investigated, or were not deemed of sufficient use to call to testify. Finally, contrary to the implication at page 5 of the court's opinion, Artie Lawson did not testify at trial, but only at the habeas hearing. While these witnesses might convince some jurors (unlike the federal district judge), a juror need not be unreasonable to consider these statements to be last-minute fabrications in support of the defendant.

3. *Blood evidence.*

This is a convoluted scientific argument on behalf of an implication of a vast conspiracy on the part of Tennessee law enforcement officials. Simply put, the theory is that House never had any of the victim's blood on his jeans while the jeans were in his possession. Instead, blood from the victim's autopsy was smeared on the jeans in an elaborate charade designed to simulate the blood having been present when the jeans were found. This theory is based on a highly contested interpretation of abbreviations in the original scientific report, and on disputed interpretations of the amount and

location of blood from certain vials after they had been transported. Again, in my view, some reasonable jurors would be likely to believe the direct testimony and evidence in preference to a disputed scenario requiring the perjurious cooperation of numerous government officials.

In addition, some reasonable jurors could (and at least one would) be persuaded by the strong circumstantial evidence presented at trial. Ms. Turner's testimony regarding House's absence during the crucial time surrounding the murder and his return in a disheveled condition is consistent with his committing the murder, and inconsistent with his defense theory. Finally, some reasonable juror, in assessing the strength of the new evidence, would agree with the district judge's finding that House's direct testimony, presented for the first time at the habeas hearing, lacked credibility.

II

The Schlup Standard.

The appropriate standard for this court to employ in judging whether the evidence of House's "actual innocence" is so strong that we should consider his claim of ineffective assistance of counsel, regardless of his procedural default, is set out in *Schlup v. Delo*.(1) While various forms of words are used at different points in the opinion, the clearest statement appears at page 329, where Justice Stevens states that this extraordinary step is permitted only if we judge that "it is more likely than not that *no reasonable juror would* have convicted" the petitioner. *Schlup*, 513 U.S. at 329 (emphasis added) (internal quotation marks omitted). In making this judgment, *Schlup* "allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *See Schlup*, 513 U.S. at 327-28, quoted in *Lott v. Coyle*, 261 F.3d 594, 621 (6th Cir. 2001) (Cole and Merritt, JJ.). As Justice Stevens indicates, this is not the same as the standard in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Schlup*, 513 U.S. at 330. This judgment is not limited to the evidence at the original trial, and it focuses on what "would" happen, rather than what constitutionally "could" happen.

Even so, this standard is still one that requires us conscientiously to consider the entire range of "reasonable" jurors. In America, today, there are approximately 200 million persons eligible to serve as jurors. Even with the numbers of statutory and other disqualifications, one would trust that the large majority of these persons are in fact reasonable. For petitioner to fail to meet the *Schlup* standard, we need only assess that one of those potential jurors has a 50+ % likelihood of convicting, considering all the new evidence. As the review of the evidence above shows, that is not a difficult judgment to make. That judgment becomes even easier when the impact of the defendant's own incredible testimony at the habeas hearing is taken into account, as it must be.

However, the difficulty for a defendant seeking to satisfy this standard is even greater, for the standard does not require that *any* individual reasonable juror actually have a 50+ % probability of voting to convict. The standard requires only that we believe it to be more likely than not that *not a single one* of the aggregation of reasonable jurors who might have *some* inclination to vote for conviction would in fact do so. I will explain that difference.

If each person in a group of 100 reasonable jurors had a 10% likelihood of voting to convict the defendant, the outcome of the *Schlup* assessment would depend almost entirely on our belief about the independence of the jurors' judgments. By that, I mean that if each juror's opinion is independent of that of every other juror, it is almost certain that one out of the 100 jurors would convict.(2) If we believed that every juror thought exactly like every other one - that is, that their opinions had no independence at all, then there would be only a 10% chance of conviction by any juror in the whole group, and the *Schlup* standard would be met.

Thus, under these circumstances, the outcome of the *Schlup* assessment could turn on whether we believe there is any independence, or difference, in the thought processes of reasonable jurors. I believe that the experience of virtually every lawyer who has participated in a jury trial is that the

thought processes of jurors have a considerable degree of independence. The reason that one juror may vote to convict (or to acquit) may differ significantly from that of other jurors. When that is the case, we have the following result. If any significant number of reasonable jurors have *some* likelihood of conviction, there is a very high probability that at least one such juror will in fact convict, given almost any reasonable degree of independence.(3) Thus, an honest application of the *Schlup* standard means that a prisoner can meet it only if a judge can conscientiously assert that every reasonable juror is almost certain to vote to acquit. This case does not meet that standard.

In summary, in order to justify overturning a state court judgment, the *Schlup* standard "does not merely require a showing that a reasonable doubt exists in light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Schlup*, 513 U.S. at 329. Footnote 4 of the court's opinion expresses the court's belief that House's sentence must be overturned if "even 50 of 100 . . . jurors would now seriously doubt the persuasiveness of the state's case." This statement is refreshingly candid, because it expresses what a careful reader might perceive to be the standard of many jurists in death penalty cases. However, it is as clear as the English language can make it that this is not the standard stated by Justice Stevens in the quotation above. The footnote clearly supports overturning a sentence in a situation (quite likely the situation in our case), where half of reasonable jurors would not, as the footnote says, "seriously doubt the persuasiveness of the state's case." In such a situation, I find it impossible to believe that a decision-maker, conscientiously reading the words of the *Schlup* decision, could determine that "no reasonable juror would have found the defendant guilty."

As a federal appellate court reviewing a federal habeas court's review of a state court's determination, and attempting to consider (as required by *Schlup*) what "any reasonable juror" (and thus *all* reasonable jurors) would do, we are *inevitably* making hypothetical judgments. That statement is as true of the majority and special dissenting opinions as it is of mine. But we *must* do that in order to be faithful to *Schlup*. Otherwise we are simply doing what some observers may think is done regularly in such cases -- substituting our own judgment of what the evidence shows for the opinion of the jury, and of all jurors.

My mathematical analysis at pages 27-28 is *not* the main line of my analysis. As clearly stated at page 26, a claim such as House's fails *whenever* the reviewing judge can state a belief that some single reasonable juror would in fact still convict, taking into account all the new evidence (see page 26).

The mathematical analysis that so excites the court is simply the portion that goes beyond the statement above to indicate the reality of the meaning of the words that Justice Stevens penned. The standard is indeed a very difficult one to meet; it is not designed simply to allow judges to substitute their own judgment for that of some, or even most, jurors. As *Schlup* states: "It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses." 513 U.S. at 329.

That is all that my analysis attempts to explicate.

The fundamental error of footnote 4 is boldly stated when it complains that the dissent believes "that House should be executed" [more accurately, that his petition should be rejected on a proper application of the law] because "at least 1 hypothetical hold out juror would disagree" with the majority's implied opinion in this case. Any complaint with this statement simply betrays an unwillingness to face up to the exact language in *Schlup*. *That* opinion specifically says that "the standard requires the . . . court to make *a probabilistic determination about what* reasonable, properly instructed jurors would do." *Schlup*, 513 U.S. at 319 (emphasis added). Thus, the Supreme Court specifically requires us to make the type of determination that appears to upset the court. Further, the complaint in footnote 4 simply refuses to confront the fact that if *one juror*, acting reasonably, would have voted to "find him guilty beyond a reasonable doubt" then it is definitionally impossible to make the necessary determination, in the words of Justice Stevens, that "*no* juror, acting reasonably,

would have voted to find him guilty beyond a reasonable doubt." *Ibid.* (emphasis added). The fact that the court may consider such an argument to be "hypothetical," "medieval scholastic" or "remarkable" does not alter the words and holding in the Supreme Court's opinion.

III

A careful reader will discern that a number of the significant criticisms of the dissent that are leveled in section III of the court's opinion do not correspond with what is actually written in the dissent. At page 19, the court's opinion states that I am applying "the old standard of the sufficiency of the evidence at trial." In fact, at pages 24-25, I consider the question in light of all the evidence, old and new, as I clearly state at page 26. Further a careful reader will find that I make no reference to the "any reasonable juror could convict" standard of *Jackson v. Virginia*, but rather rely solely on the holdings in *Schlup*.

The charges made at page 20 that "the test used by our dissenting colleagues [is] the sufficiency of the evidence in the trial record" and "whether there is evidence that could have supported a jury's decision to convict, regardless of the new evidence" are nowhere held, supported, nor implied in the dissent.

A careful reading of *Schlup* also belies the statement at page 20 that "the question is . . . 'if they [the new statements] . . . are true' whether a juror . . . . would vote to convict.'" (quoting *Schlup*, 513 U.S. at 331). That language is excerpted from the portion of *Schlup* that specifically makes that statement in the context of facts that "the Court of Appeals assumed [were true] for the purpose of applying its understanding of the *Sawyer* standard." *Ibid.* In other words, Justice Stevens was saying that *if* the reviewing court believed the new evidence to be true (while the Justice recognized that "those new statements may, of course, be unreliable") *then* the *Schlup* standard would be met. He certainly did not say that a reviewing court was required to find reliable any and all new evidence proferred.

Finally, it should be noted that this dissent does not state, contrary to page 21, that "all the questions before us" are fully exhausted. As is clearly stated at page 23, it is the underlying claim before us, "ineffective assistance of counsel," that is fully exhausted.

IV

The Aggravating Factors.

The court's opinion also tries to use the allegedly new evidence to undermine the three aggravating factors found by the jury.

With regard to the first aggravating factor, our court's statement (page 11) that the primary evidence for the existence of "torture or serious physical abuse" was the evidence of rape is belied both by the state's failure specifically to argue that point, and by the extensive evidence of the physical beating and strangulation of the victim.

The second aggravating factor is that House committed the crime in the course of an attempted rape or kidnaping. Kidnaping includes "unlawfully . . . inveigling [or] enticing away another with the intent of causing him to be secretly confined or imprisoned against his will." Surely some reasonable juror would find that, if House committed the offense as described in the testimony, he enticed the victim away in order to confine her against her will. Not every reasonable juror would be likely to believe that he tricked her out of the house in order to discuss epistemology, and a sudden affray over Foucault caused him to kill her in a blind rage.

The third aggravating factor is the simplest: that House had previously been convicted of a felony

"involving the use or threat of violence to a person." This item was amply proved by Utah state records showing House's conviction for aggravated sexual assault. The only error was that evidence was also introduced (truthfully) that he had been sentenced to five years to life for that offense, and was on parole. All that the Tennessee Supreme Court found was that the latter factual information was irrelevant. It certainly did not find that there was any prejudice by the introduction of such evidence. Since House was at liberty when the crime was committed, he must have either served out his sentence, escaped, or been on parole. Of the three, being on parole is the most benign interpretation of the evidence. Nor was the length of the sentence for this crime particularly prejudicial. Thus, the third aggravating factor has not been undermined to any significant degree.

V

I turn now to the specific questions that the court's opinion certifies to the Tennessee Supreme Court. It is frequently said, in response to a rhetorical question, that there are "smuggled assumptions" within a question - the unstated premises upon which the question rests. In this case, however, the assumptions have not been smuggled - they have been cleared through customs with all duties paid.

The first question specifically states that "a defendant whose sole *remaining* aggravating factor was introduced in an erroneous manner" is involved. (Emphasis added.) Of course, the destruction of the other factors is the very element that should be decided, not assumed. Indeed, as discussed above, the remaining aggravating factors are at most weakened, but not removed, even if the defendant's evidence is believed. Of course, if his evidence is believed, he didn't commit the crime at all, so the aggravating factors should not even be considered. If, on the other hand, he did commit the crime, then the strength of the evidence that purports to undermine the aggravating factors is itself demolished or greatly weakened.

The second question appears to be a demand that the Tennessee Supreme Court re-entertain a petition for post-conviction relief. It asks "in light of the new DNA evidence" (which has never been presented to the Tennessee courts), and in light of "the error in the presentation of the third aggravating factor" (a matter fully considered by the Tennessee Supreme Court), what is the state of Tennessee law? This is essentially asking the Tennessee court to render an advisory opinion based on a record that its processes and fact finders have not considered.

The third question continues boldly to assert that the "evidence disproves the state's theory that the defendant murdered the victim in the commission of a sexual assault." It purports to ask the Tennessee Supreme Court to consider "malice aforethought," but to do so "together with other newly discovered evidence of actual innocence." Again, the theories are in contradiction. If House did not commit any crime, then malice aforethought is irrelevant. If he did commit the crime, albeit without depositing semen on the victim's clothing, then it is extremely difficult to say that luring a person out of her bed and home in the middle of the night and murdering her in a way that results in her body being found "partially concealed in a brush pile at the bottom of a wooded embankment" 100 yards from her home (page 3, lines 3-5 of section I) does not permit some reasonable juror to find that there was malice aforethought. In particular, the statement from the court's opinion quoted above presents the facts much more fairly than the court's bland statement at page 11 that "[a]lthough House purportedly lured the victim out of her house, her body was found within yards of her doorstep. . . ."

The majority's basic problem is that if the evidence introduced at the habeas hearing does not compel a belief in House's innocence of the crime of killing Ms. Muncey, then it does almost nothing to undermine the death sentence. Thus, the questions purporting to deal with the sentence independent of the crime seem to have no basis.

Finally, the first and third questions as stated at pages 17 and 18 do not even purport to address the supposedly crucial question of whether a state avenue is open to process a claim. Instead, they ask, in terms that assume that all of the relevant material is procedurally properly before some Tennessee

court, does "the law" (1) "require a new sentencing hearing" and (3) "require a new trial?"

Question 2 does at least appear to address some possibly relevant question by asking whether the Tennessee Supreme Court's "review process now permit[s] it to remedy any error in the weighing process by the jury in light of newly discovered evidence?" However, beyond our invitation to the Supreme Court to "remedy any error . . . by the jury," the most the Tennessee Supreme Court could do would be to say that there are avenues for last-minute post-conviction petitions. This possibility has already been amply demonstrated in *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001). There, a "petition for a writ of error coram nobis" was filed in state court two days before a scheduled execution, based on alleged new evidence purportedly showing actual innocence. *Id.* at 104. The Tennessee Supreme Court swept aside all procedural obstacles and directed consideration on the merits. *Id.* at 103. Thus, there is clearly no basis for a remand to see if the Tennessee Supreme Court can do what it has already done in an analogous case.

VI

In short, the court's opinion today is a procedural muddle, leading to far greater future muddles, to little practical effect other than to add an additional layer of delay.

Contrary to the statements in the court's opinion, the question raised by this dissent is not whether this decision "will delay House's execution." (page 19) The question is whether it will unjustifiably delay reaching finality. I have no particular brief for this defendant's execution, or his exoneration, other than as the evidence in this case leads me to make a decision based on existing law. I do have a brief for the value of reaching finality of decision, a brief that has been eloquently explained by the Supreme Court in *McCleskey v. Zant*, 499 U.S. 467, 491-92 (1991). If the court is fully convinced that no avenues are available (contrary to *Workman v. State*), and if it is convinced, contrary to the above demonstration, that the *Schlup* standard can be met on this evidence, then it should simply say so. The mere invocation of the statement "better to be safe than sorry" (page 21) simply means that no decision should ever be made.

It is obvious that the court's opinion is undergirded by an evaluation of the evidence that would argue that very few, if any, reasonable jurors would find House guilty beyond a reasonable doubt. If the court would clearly hold that now, at least we would have a straightforward legal decision, albeit one subject to challenge on further review. But in this case, we have undertaken a novel diversionary process, and added a new and unjustified procedure for avoiding finality. This decision could be invoked by any court whenever a claim of actual innocence, however tenuous, is raised for the first time in federal court. I therefore respectfully dissent.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. Because I am not comfortable with either the majority opinion or Judge Boggs's dissent, I write separately to express my own views. Although I agree with the majority opinion that the petitioner presents a strong claim for habeas relief, at least at the sentencing phase of the case, I disagree with the decision to certify questions to the Tennessee Supreme Court. Judge Boggs lays out a cogent argument to the effect that the majority's questions are loaded with a number of unwarranted assumptions, the answers to which will not advance the ultimate resolution of this case. I therefore agree with Judge Boggs that this court can and should decide the case on the merits as it is currently before us.

Although I agree with Judge Boggs's rationale on the question of certification, I decline to join his conclusion that we should affirm the district court's opinion. I find particularly disturbing the notion

that the defendant's entitlement to relief hinges on a hypothetical statistical analysis that attempts to find mathematical precision in an endeavor that in the end requires a judgment call based on a sound understanding of human nature. I agree with Judge Merritt's response on this point as expressed in footnote 4 of his opinion. Judge Boggs's conclusion that "an honest application of the *Schlup* standard means that a prisoner can meet it only if a judge can conscientiously assert that every reasonable juror is almost certain to vote to acquit" seems to me an overstatement of Justice Steven's language that the test is whether "it is more likely than not that no reasonable juror would have convicted." Judge Boggs's interpretation would make the *Schlup* standard virtually impossible for a defendant to meet. In my opinion, it is a misreading of the standard as articulated by the Supreme Court.

In sum, I believe that there is no need to certify any questions to the Tennessee Supreme Court and this court should decide the issues currently before it on the merits. But I also disagree with Judge Boggs's interpretation of the *Schlup* standard and his resulting resolution of this case. Finding myself caught between Scylla and Charybdis (to say nothing of medieval angels and Foucault), I respectfully file this separate dissent.

Footnotes

[1] Laura Muncey's name is spelled both with and without a "u" throughout the record. For the sake of consistency we are using the "Laura" spelling. She is also referred to by her married name, Laura Muncey Tharp.

[2] House's mother also testified that he did not use her automobile that evening.

[3] We certify this case pursuant to Rule 23, Rules of the S.Ct. of Tennessee.

[4] Judge Boggs has added a lengthy argument based on his statistical and mathematical juror analysis designed to prove scientifically his belief that "it is almost certain that one out of the 100 jurors would [still] convict" House, even in light of the new evidence (see paragraph 21 and footnotes 2 and 3 of the dissenting opinion). Judge Boggs then seems to assert that House should be executed and there should be no certification of questions apparently because of his belief that at least 1 hypothetical hold out juror would disagree with the other 99 on House's case. This is a remarkable judicial argument that Judge Boggs somehow derives from Justice Stevens' opinion in *Schlup v. Delo*.

In no way, however, does Justice Stevens' holding in *Schlup* suggest that courts should engage in this kind of reasoning -- akin to medieval scholastic argumentation about how many hypothetical angels, or hypothetical minds, can sit on the head of a pin and disagree. Justice Stevens' opinion does not require unanimity among some hypothetical number of hypothetical juridical minds. It is an opinion designed to deal with real situations presenting new evidence of actual innocence in death cases. Scholastic arguments aside, surely no one would really hold the view that House should be executed if 99 of 100, or even 50 of 100, jurors would now seriously doubt the persuasiveness of the state's case. In the real world of nonhypothetical juridical minds, only a new trial with real jurors will resolve such a problem.

[1] This assumes, of course, that we have already determined that there is no state avenue open to consider that claim further. This is, of course, contrary to fact as shown by *Workman v. State*, 41 S.W.2d 100 (Tenn. 2001). *See infra* at 34.

[2] The mathematics is such that the chance that no one of 100 independent jurors, each with a 10% probability of voting to convict, would convict, is .9 to the 100th power, which is less than 1 chance in 25,000.

[3] The mathematics is a bit complicated, but here is an example. If a group of 100 reasonable jurors each has a 10% likelihood of conviction, we can assess the degree of independence of each pair of jurors as follows:

1) If their opinions are wholly dependent, they will, of course, agree 100% of the time;

2) If their opinions are wholly independent, they would still agree 82% of the time. In our example, 81% of the time they would both acquit, 1% of the time they would both convict, and 18% of the time one would convict and one would acquit.

If their views are even a little bit independent, for example, if they now agree only 98% rather than 100% of the time, mathematics indicates that there is a very high likelihood, well beyond 50%, that at least one of the reasonable jurors would in fact vote to convict.

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File Name: 02a0084p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Paul Gregory House, *Petitioner-Appellant,* *v.* Ricky Bell, Warden, *Respondent-Appellee*	No. 00-6136

Appeal from the United States District Court

for the Eastern District of Tennessee at Knoxville.

No. 96-00883--James H. Jarvis, District Judge.

Argued: October 31, 2001

Decided and Filed: March 11, 2002

Before: MERRITT, NORRIS, and SILER, Circuit Judges.

COUNSEL

ARGUED: Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Glenn R. Pruden, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee. **ON BRIEF:** Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Glenn R. Pruden, Alice B. Lustre, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville,

Tennessee, Michael E. Moore, Paul G. Summers, TENNESSEE ATTORNEY GENERAL'S OFFICE, CIVIL LITIGATION & STATE SERVICES DIVISION, Nashville, Tennessee, for Appellee.

NORRIS, J., delivered the opinion of the court, in which SILER, J., joined. MERRITT, J. (pp. 28-33), delivered a separate dissenting opinion.

OPINION

ALAN E. NORRIS, Circuit Judge. Petitioner Paul House appeals from the district court's denial of a writ of habeas corpus, 28 U.S.C. § 2254. A Tennessee jury found petitioner guilty of the murder of a neighbor, Carolyn Muncey, and sentenced him to death.

This court granted a certificate of appealability as to all issues. However, petitioner has limited his brief to a discussion of the following: 1) Whether the manner in which the Tennessee courts applied the doctrine of waiver during petitioner's post-conviction proceedings constitutes an adequate and independent state procedural bar to his ineffective assistance of counsel claim; 2) Whether petitioner established his actual innocence.

For the reasons that follow, we affirm the denial of the writ.

I.

This court reviews a district court's legal conclusions in a habeas proceeding de novo and its factual findings for clear error. *See Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999). Petitioner initiated this habeas action on September 30, 1996; the petition was amended on September 16, 1997. Consequently, this court's review of the state court's decision is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997).

Because factual determinations by state courts are entitled to a presumption of correctness, 28 U.S.C. § 2254(e)(1), we will begin by quoting from the Tennessee Supreme Court's opinion denying petitioner relief in his direct appeal:

> The victim of the homicide was Mrs. Carolyn Muncey, who lived with her husband and two young children on Ridgecrest Road in rural Union County, Tennessee. Mrs. Muncey was in her late twenties, and her children were about eight and ten years old at the time of her death on July 13, 1985.
>
> In March 1985 appellant Paul Gregory House was released from prison in Utah and moved to the rural community in which the Muncey family lived. There he resided with his mother and step-father for several weeks, but in June he moved into a trailer occupied by his girl friend, Donna Turner, which was located about two miles from the Muncey home. Appellant did not own an automobile; but he was permitted to drive his mother's car from time to time, and he also drove Ms. Turner's car on some occasions.

Other than doing occasional farm work for his stepfather, appellant does not appear to have been regularly employed. He did not testify at trial at either the guilt phase or the sentencing hearing. He was shown to have had one prior conviction for aggravated sexual assault, a charge to which he pled guilty on March 16, 1981 in Salt Lake County, Utah. Apparently he was placed on parole in that state, and supervision of his parole was transferred to Tennessee when he returned to this state. He was approximately twenty-three years old at the time of the homicide in this case.

Mrs. Muncey disappeared from her home in the late evening of Saturday, July 13, 1985. Her badly beaten body was found on the following afternoon at about 3 p.m., lying partially concealed in a brush pile about 100 yards from her home.

Apparently the husband of the victim was not at home during the early part of the evening of July 13. Mrs. Muncey and her children visited a neighbor and left at about 9:30 p.m. to return to their home. Later the older child, Laura, awoke. She testified that she heard a voice which sounded like her grandfather making inquiry about her father. She also heard someone tell her mother that her father had been in a wreck near the creek. She heard her mother sobbing or crying as she left the house. When her mother did not return, the two children went to look for her at neighboring homes. Not finding her, they returned home and waited until their father arrived. Discovering that his wife was missing, he took the children back to the home of the neighbor where they had visited earlier in the evening and then called for members of his family to look for his wife.

When the body of Mrs. Muncey was discovered the next afternoon, she was dressed in her nightgown, housecoat and underclothing. Her body was badly bruised, and there were abrasions and blood giving every evidence that she had been in a fierce struggle. Apparently a severe blow to her left forehead had caused her death. It appeared, however, that she had also been partially strangled. A pathologist testified that the blow to her left forehead caused a concussion and hemorrhage to the right side of the brain from which she died, probably one to two hours after being struck. He testified that she probably would have been unconscious after having been struck. He estimated the time of her death at between 9 p.m. to 11 p.m. on Saturday, July 13, but emphasized that this was at best a rough estimate.

Appellant never confessed to any part in the homicide, and the testimony linking him to it was circumstantial. There was evidence showing that he knew Mr. and Mrs. Muncey and had been with them socially on a few occasions. Through defense proof there was testimony that Mrs. Muncey and her husband had been having marital difficulties and that she had been contemplating leaving him. There was no evidence to indicate that the appellant was aware of that situation, however, or that there had been any previous romantic or sexual relationship between him and the victim.

On the afternoon of Sunday, July 14, 1985, two witnesses saw the appellant emerge from a creek bank at the side of Ridgecrest Road at the site where Mrs. Muncey's body was later found concealed in the underbrush. He was wiping his hands with a dark cloth and was walking toward a white Plymouth automobile, parked on the opposite side of the road, belonging to his girl friend Donna Turner. The two witnesses spoke briefly to

appellant, all of them discussing the fact that Mrs. Muncey had disappeared. Later the two witnesses became suspicious of what they had observed and returned to the point where they had seen appellant emerge from the embankment. Looking down the bank, they found the partially concealed body of Mrs. Muncey. They promptly notified the sheriff.

Appellant later admitted that he had been in the area but denied that he had seen the body of Mrs. Muncey or had any knowledge of its presence. The dark rag which he had been using when first seen was never produced. It was the theory of the State, however, that this was a dark "tank top" or jersey which appellant was shown to have been wearing on the previous evening, July 13.

Appellant gave two statements to investigating officers in which he denied being involved in the homicide. In both of these statements he stated that he had been at Ms. Turner's trailer the entire evening of July 13 and that he had not left until the next afternoon when he went to look for Hubert Muncey after learning of the disappearance of the latter's wife.

On Sunday afternoon various witnesses observed that appellant had numerous scratches and bruises on his arms, hands and body, there being an especially significant bruise on the knuckle of his right ring finger. Appellant explained that these injuries had been sustained innocently earlier during the week, but when Ms. Turner was called as a witness, she said that she had not observed them prior to the evening of July 13. Appellant also told investigators that he was wearing the same clothes on Sunday, July 14 as he had been wearing the previous evening. It was later discovered, however, that a pair of blue jeans which he had been wearing on the night of the murder was concealed in the bottom of the clothes hamper at Ms. Turner's trailer. These trousers were bloodstained, and scientific evidence revealed that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with appellant's own blood. Scientific tests also showed that fibers from these trousers were consistent with fibers found on the clothing of the victim. There were also found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant.

Some of the most damaging evidence against appellant was given by his girl friend, Ms. Turner. She at first told investigators that he had not left the trailer during the course of the evening of July 13. Later, however, she modified this testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. She stated that he did not take her automobile. When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing either his blue jersey or his tennis shoes. The shoes were later found in an area different from the place where appellant told her he had lost them.

Appellant told Ms. Turner that he had thrown away the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him. It was after the appellant's return to the trailer that Ms. Turner first noticed the bruises and abrasions on his hands referred to previously.

Appellant's mother testified that he had not used her automobile on Saturday evening.

She testified that during Saturday and Sunday she had been planning to separate from appellant's stepfather and that appellant had been assisting her in her preparations for moving.

At the sentencing hearing the State proved appellant's prior conviction for aggravated sexual assault. Appellant's parents testified that he came from a broken home and had been subjected to stress as a result of that experience. Appellant's mother also testified that in the interval between the guilt trial and the sentencing hearing appellant had attempted suicide. She read into evidence a letter which he had written to her denying his involvement in the homicide. Apparently he had cut his wrists while in the jail awaiting the sentencing hearing, but the degree and extent of the injuries were not detailed in evidence. They do not appear to have been serious and did not prevent his attending the sentencing hearing.

Although the evidence against appellant was circumstantial, it was quite strong. Particularly incriminating was the testimony that he had emerged from an embankment where the body was found, wiping his hands on a dark cloth, without disclosing to anyone the presence of the body. Damaging also were the discovery of his bloodstained trousers and the testimony of Ms. Turner, which a trier of fact could have found sufficient to demolish his alibi and to demonstrate that he had been in a heavy struggle near the time when the homicide must have occurred.(1) A classic case for determination by a jury was presented, and the evidence clearly is sufficient to support the conviction.

Following the sentencing hearing, the jury imposed the death penalty. In their verdict they found that the State had established three aggravating circumstances, these being: (1) appellant had previously been convicted of a felony involving the use or threat of violence to the person; (2) the homicide was especially heinous, atrocious, or cruel; and (3) it was committed while appellant was committing or attempting to commit or fleeing from the commission of rape or kidnapping. T.C.A. §§ 39-2-203(i)(2), (5), and (7).

There was ample evidence to support all of these findings and to support the conclusion of the jury that no mitigating circumstances had been established which would outweigh the aggravating circumstances. Certainly the sentence of death was not disproportionate to that imposed in other cases in view of the violent and brutal nature of the homicide shown in this record.

State v. House, 743 S.W.2d 141, 142-43 (Tenn. 1987) (footnote original).

After petitioner's conviction and sentence was handed down in February 1986, he took a direct appeal to the Tennessee Supreme Court. The Tennessee Supreme Court affirmed in the opinion just cited. Petitioner failed to seek a writ of certiorari in a timely manner.

Post-conviction proceedings began in February 1988 with the filing of a *pro se* petition for post-conviction relief in the trial court. This petition, amended after appointment of counsel, was denied by the trial court on November 29, 1988. Although claims of ineffective assistance of trial counsel were submitted to the court, they were not argued, nor was trial counsel called as a witness at the hearing. Only a single issue was taken to the Tennessee Court of Criminal Appeals: whether a jury instruction improperly misled jurors into believing that they must unanimously find mitigating circumstances. The Court of Criminal Appeals affirmed the conviction on December 15, 1989. The

Tennessee Supreme Court denied leave to appeal and the United States Supreme Court denied certiorari.

A second petition for post-conviction relief was filed on December 14, 1990. After conducting hearings, the trial court denied relief on the ground urged by the State: that all the issues presented had either been previously determined in the first petition or, if not, had been waived.

The Court of Criminal Appeals affirmed the trial court on September 2, 1992. However, the Tennessee Supreme Court remanded for reconsideration in light of a recent opinion that the Court later withdrew. The Court of Criminal Appeals remanded the matter to the trial court for further consideration of the waiver issue. This remand was averted, however, when the Tennessee Supreme Court re-instated the trial court's initial dismissal of the second petition for post-conviction relief. *House v. State*, 911 S.W.2d 705, 722 (Tenn. 1995). Critical for this habeas action is the Court's holding concerning waiver:

> We conclude that a "full and fair hearing" sufficient to support a finding of previous determination occurs if a petitioner is given the opportunity to present proof and argument on the petition for post-conviction relief. We further conclude that the rebuttable presumption of waiver is not overcome by an allegation that the petitioner did not personally and therefore, "knowingly and understandingly," waive a ground for relief. Instead, waiver is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney. Finally, we conclude that there is no right to effective assistance of counsel in post-conviction proceedings, and therefore, an allegation of ineffective assistance of prior post-conviction counsel does not preclude application of the defenses of waiver and previous determination.

Id. at 714. Because of its holding, the Court re-instated the trial court's original denial of relief.

Petitioner filed a *pro se* habeas petition on September 30, 1996, which was eventually amended after the district court granted *in forma pauperis* status and appointed counsel. The district court granted the State's motion for summary judgment on the majority of claims in an order entered June 25, 1998. It conducted an evidentiary hearing on petitioner's actual innocence claim in February 1999. After considering post-hearing briefs of counsel, the district court denied habeas relief. It also denied a certificate of appealability, which was later superseded by this court's grant of a certificate as to all issues.

II.

The first issue raised by petitioner on appeal involves his contention that both the Tennessee courts and the district court erred when they concluded that his ineffective assistance of counsel claims were procedurally barred.

Initially, the district court deferred granting summary judgment to the State on the claims of ineffective assistance of counsel because "these claims are intertwined with petitioner's claim of actual innocence." Memorandum Opinion, June 25, 1998 at 41. It went on to provide the following rationale:

> [T]he court will be unable to determine whether the claims should be barred on the ground of procedural default until the conclusion of the evidentiary hearing. *Bousley v.*

> *United States*, 118 S. Ct. 1604, 1611 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" Accordingly, in addition to petitioner's claim of actual innocence, the court will consider [the ineffective assistance of counsel claims].

Id. at 41-42. However, after conducting an evidentiary hearing and determining that petitioner had failed to establish actual innocence, the district court held that petitioner's ineffective assistance of counsel claims were "barred on the ground of procedural default." Memorandum Opinion, February 16, 2000 at 46-47.

Petitioner concedes that an adequate and independent state-law ground can procedurally bar subsequent habeas claims. This circuit has developed a four-part analysis to determine whether a claim is barred:

> Under *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), this circuit utilizes the following four-part analysis when the state argues that a federal habeas claim has been procedurally defaulted in state court: (1) whether there is a procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to follow this rule; (2) whether the state courts actually enforced the state procedural rule; (3) whether the state procedural rule is an adequate and independent state ground to foreclose federal relief; and if so (4) whether the petitioner has established cause for his failure to follow the rule and prejudice by the alleged constitutional error.

White v. Schotten, 201 F.3d 743, 749 (6th Cir. 2001).

Petitioner points to the tortured path that his case took in the courts of Tennessee and argues that no hard and fast rule existed to procedurally bar his *pro se* ineffective assistance of counsel claims. Specifically, he points to the following paragraph of the opinion of the Tennessee Supreme Court:

> *Our research has revealed no reported Tennessee case dealing directly with the issue of the appropriate standard to apply when determining whether an issue has been waived.* Courts in other states have split on whether to apply a subjective or objective standard and provide us little assistance because their decisions were based largely on the particular state statutory procedure. However, Tennessee cases dealing generally with the concept of waiver in the post-conviction context apply an objective standard and impute the conduct of counsel to their clients. *See e.g., Caruthers v. State*, 814 S.W.2d 64, 70 (Tenn. Crim. App. 1991); *State v. Bishop*, 731 S.W.2d 552 (Tenn. Crim. App. 1986).

House, 911 S.W.2d at 713 (emphasis added) (footnotes omitted). In petitioner's view, this opinion illustrates that no rule had been clearly established.

We do not write on a clean slate with respect to this issue. *See Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001); *see also Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998). In *Cone*, this court made clear that the *House* opinion relied upon by petitioner merely explained existing state law. Petitioner in that case contended that he had not personally waived a challenge to a jury instruction. In rejecting his claim, we explained:

> First, we are aware of two cases in which courts have considered whether a petitioner

> is bound by his attorney's waiver of a constitutional claim. *Coe*, 161 F.3d 320, and *House* v. *State*, 911 S.W.2d 705 (Tenn.1995). The *House* court stated that "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." *House*, 911 S.W.2d at 714. *House* does not appear to announce a new standard, as Cone suggests. Rather, it seems merely to affirm Tennessee's standard of waiver.
>
> In *Coe*, as we explained earlier, this court held that the petitioner had procedurally defaulted his state claim that the trial court failed to give a correct malice instruction. He presented the claim for the first time in his second petition for post-conviction relief rather than his first petition, as a consequence of which the Tennessee Court of Criminal Appeals found it had been procedurally waived. *Coe*, 161 F.3d at 329-31. This court cited *House* when determining that Coe had defaulted his claim under an "objective" standard of waiver. However, the petition upon which the court relied in finding the default was filed before *House* was decided. Thus, concerning defaults that occurred before *House* was decided, the Tennessee courts have strictly and regularly applied the traditional standard of waiver, whether the waiver is made by counsel or the petitioner personally.
>
> . . . .
>
> Last, we are not persuaded that Cone is correct in his claim that Tennessee law was in a state of confusion on whether an "objective" or "subjective" standard of waiver is appropriate. It is not clear from the Tennessee cases that procedural default may not be charged to a petitioner who has not himself "knowingly and understandingly" waived timely assertion of a federal constitutional claim when his attorney has done so. We are satisfied that Tennessee follows the traditional rule that a petitioner is chargeable with his attorney's failure to timely assert a claim and with the consequences of failing to do so.

Id. at 974. We find this reasoning dispositive of the issue before us and accordingly conclude that the district court was correct when it determined that petitioner's ineffective assistance of counsel claims had been procedurally defaulted.

III.

We turn next to petitioner's claim of actual innocence. In *Schlup v. Delo*, 513 U.S. 298 (1995), the Court held that a petitioner must show either cause and prejudice or a miscarriage of justice in order to obtain habeas review of an otherwise procedurally defaulted claim. With respect to a miscarriage of justice, the petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup*, 531 U.S. at 832. This exception is rare and should be applied only in the extraordinary case:

> Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty. Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. See *supra*, at 864. To be credible, such a claim requires petitioner to

> support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful. Even under the pre-*Sawyer* regime, "in virtually every case, the allegation of actual innocence has been summarily rejected." The threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing.
>
> Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent.

513 U.S. at 324-25 (footnotes omitted). Thus, "[t]o establish the requisite probability [that petitioner is actually innocent], the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." 513 U.S. at 327.

Because the district court conducted an evidentiary hearing on the issue, there is testimony about events beyond what was presented during the original trial. Petitioner contends that this new evidence is sufficient to establish his actual innocence. We will summarize it before explaining why, in our view, petitioner has failed to show that it is more likely than not that no reasonable juror would have convicted him.

Petitioner testified for the first time at the evidentiary hearing. He offered this version of the night of the murder: "I went for a walk. I got jumped, ran around, came back." He went on to explain that the terrain was hilly and it was dark:

> I had only been walking about maybe 20 minutes at the most it seems like. A truck pulled up behind me with, I remember it as being like 4-wheel drive. It sat up high, you know. Headlights were on. It had lights across the roof of the cab and they were on. I couldn't see anything other than that about the truck. . . . I turned around and I kept walking. I believe there were at least two guys in the truck. I know the driver got out on his side, one guy got out on the passenger side. I couldn't really discern it, but I think there was one other guy in the cab. The driver came up. I can remember he said something, but I don't even know if I heard him correctly at the time. He grabbed me by the arm. He started to jerk me around. I turned around turned and threw back with my left-hand. I hit him. He let go. I started running. I ran kind of diagonally across the road into some trees, bushes, whatever it was. I heard a shot, at least one. There might have been two. I am not sure. I ran around through those woods for a while. I don't know how long. When I came back out - I believe at one point I ran to the right, once I got into the woods, and started heading back. . . . I went back across the road up to Donna's house. When I got, I stepped on something, a sharp rock or something. I knew I stepped on it. When I looked down I only had one shoe. I lost one of them while I was running. I took the other one off and threw it across the road.
>
> . . . .
>
> I didn't even notice my shirt was gone until I got up to the trailer . . .

As the factual summary of the Tennessee Supreme Court attests, this version of events does not differ markedly from the one presented by Donna Turner during trial. When asked why he initially lied to investigators by telling them that he had not left the trailer at all, petitioner responded, "I was on parole. I didn't want to draw attention to myself."

In short, petitioner's testimony merely restates a scenario presented to the jury that convicted him. Moreover, the district court, which had the opportunity to assess petitioner's demeanor, found his testimony to be less than credible.

During the evidentiary hearing, petitioner devoted considerable time to the trial testimony of Billy Ray Hensley, the individual who saw petitioner near the spot where the body was discovered. Specifically, petitioner introduced maps and photographs in order to show that Hensley could not have seen what he purported to see.

At trial, Hensley testified that his wife received a call at about 2 p.m. on July 14 that Mrs. Muncey was missing. He drove to the Muncey trailer and talked to some of the family members. He then "went to check on my tobacco." After visiting his fields, he ended up on Bear Hollow Road, which is near where the Muncey's live.

He then had an encounter with petitioner, which he described in these terms:

> [J]ust before I rounded the curve on Ridgecrest, whatever the name of that road is, I saw Mr. House come out from under a bank, wiping his hands on a black rag. And I went on down to Little Hube's(2) driveway. I pulled up in the driveway where I could see up toward Little Hube's house and I seen Little Hube's car wasn't there, and I backed out in the road, and come back towards to the Dump Road, that is what I call it. And that is when Mr. House flagged me down . . . .

The two men had a short conversation about the fact that Mrs. Muncey was missing. Petitioner was driving his girlfriend's white Plymouth.

After leaving, Hensley became suspicious and, along with his friend Jackie Adkins, returned to the spot where he thought petitioner had emerged: "I said - right along here is where I saw the boy [petitioner], and I got out and was looking off the bank, and he [Adkins] got out and walked around the car and he said - oh, my God."

On cross-examination, Hensley conceded that he could not have seen petitioner actually "down in the embankment." He would have first seen him at the top of the bank. Defense counsel also tried to bring out some inconsistencies in Hensley's statements concerning precisely when and where he first saw petitioner. On re-direct, the prosecution attempted to have Hensley clarify:

> Q. Let me ask you if this is a true statement - "I travelled about 500 feet on Ridgecrest Road when I saw a '66 or '67 white Plymouth sitting on the left-hand side of Ridgecrest Road," is that true?
>
> A: That's true.
>
> Q. Is that where you saw the car?

A: Yes, sir.

Q: Is this true? "I saw a man later identified to me as Paul G. House enter the roadway from the right-hand side of the road"?

A: He was walking toward the road, yes.

Q: All right. "And he was coming up over the bank and he had a black rag in his hand and he was wiping his hands," is that true?

A: That's true.

. . . .

Q: The estimation [of the distance on the road] that you have given, that you were pressed for, is that an accurate measurement or is that an estimate on your part?

A: That is just an estimate.

The exhibits introduced by petitioner during the evidentiary hearing were designed to show that Hensley could not have seen petitioner coming up the embankment. However, even if we accept petitioner's contention that Hensley could not have seen him until he emerged onto the road, it is undisputed that petitioner was seen in the general vicinity of the body carrying a black rag. Moreover, trial counsel effectively cross-examined Hensley regarding his inconsistent statements about when and where he saw petitioner. Thus, in our view, petitioner's attack on Henley's testimony advances his cause little, if at all.

In addition to presenting his own version of events while attempting to cast doubt on the accuracy of Hensley's testimony, petitioner takes aim at the physical evidence that linked him to the crime.

Dr. Alex Carabia performed the autopsy. He testified at trial that death was caused by a blow to the left side of her head. The victim died about an hour and a half after she was hit.

At trial, photographs of the bruises on petitioner's body were entered into evidence and three witnesses testified about his physical condition. Prior to his arrest, petitioner provided various accounts of their origin: the mysterious fight on the night of the murder; tearing down a shed a few days earlier. During closing argument, the prosecution emphasized these inconsistent statements.

At trial, FBI Agent Paul Bigbee testified that the blood samples taken from the victim were degraded. Nonetheless, the blood found on the jeans was consistent with that of the victim and not with that of petitioner.

At the evidentiary hearing, petitioner mounted a concerted challenge to this evidence.

Four vials of blood were taken from the victim during the autopsy. These were placed in a styrofoam container, which was sent from the Tennessee Bureau of Investigation (TBI) to the FBI. The petitioner referred to two demonstrative exhibits in the district court: photographs of the styrofoam container viewed from above and from the side. It was sealed by the TBI in both directions

for shipping. The photograph of the side view shows that one of the seals was broken and then resealed by a second layer of tape. FBI Agent Bigbee placed his lab number on the second layer. The first layer of tape is incomplete; it only covers the lid of the container. Agent Bigbee conceded that it was possible that the first seal had been cut before the second seal had been placed over it. To support the theory that the container was opened between the time it left the TBI and arrived at the FBI, petitioner points to the fact that the label on the container indicated that it held both blood and vaginal secretions. Yet, Agent Bigbee received the secretions in a manilla envelope.

As mentioned above, four vials of blood were sent to the FBI. According to Agent Bigbee, he would have used one fourth of a vial in testing. Petitioner's trial serology expert, Howard Bragdon, took a photograph when he received the styrofoam container from the FBI. In petitioner's view, the photograph shows one of the tubes was only one-half full and another nearly empty. Furthermore, Agent Bigbee's testimony to the contrary, it appears that some blood had spilled.

In the district court, Dr. Cleland Blake, Assistant Chief Medical Examiner for the State, examined the results of the FBI tests of the blood found on the blue jeans and also the blood taken from Mrs. Muncey. He theorized, based upon the degree of enzymatic degradation, that the blood on the blue jeans came from known samples, such as the blood contained in the vials, and not from Mrs. Muncey's body. When confronted with this conclusion, Agent Bigbee was doubtful, noting that much depended upon handling and individual circumstances.

An expert on blood splatter analysis, Paulette Sutton, also testified at the evidentiary hearing. She noted that some of the blood stains on the jeans were mixed with mud. Yet the photographs of the crime scene showed no mud present. Furthermore, National Weather Service records show that it had not rained for three days prior to the murder. Finally, there was no mud on the victim's nightgown.

Finally, petitioner notes that no blood was found on the tennis shoes he was wearing on the night of the murder. Charles Burks, petitioner's trial attorney, also testified at the evidentiary hearing. The district court summarized his testimony on the issue of the tennis shoes as follows:

> During the evidentiary hearing, Mr. Burks reviewed a report from the Forensic Services Department of the TBI, which referred to Mr. House's tennis shoes and indicated the absence of blood on the tennis shoes. Mr. Burks did not recall having seen that report before. That would have been relevant to Mr. Burks because, although there was blood on Mr. House's jeans near the cuff, there was no blood on the shoes he was wearing at the time of the offense. The shoes were found in the general area of Ms. Turner's trailer long after the murder.

Memorandum Opinion, February 16, 2000 at 25.

The court recounted the discovery of the blue jeans in these terms:

> TBI Agent Charles Scott testified that he became involved in the investigation of Mrs. Muncey's murder, at the request of another agent, on the second day of the investigation. He took a statement from Mr. House and obtained a consent to search from Ms. Turner. He went to Ms. Turner's home and seized a pair of blue jeans from the clothes hamper in the bathroom. The jeans had "reddish brown" stains that he suspected was [sic] blood on the upper part of the jeans and near the cuff; there was also some light colored mud that was not completely dry.

> Mr. Scott did not thoroughly examine the jeans at that time but rather folded them and put them in a paper bag. Mr. Scott did not recall ever seeing the jeans in a plastic bag.

Memorandum Opinion, February 16, 2000 at 23.

The court then summarized the testimony of petitioner's expert witnesses. Larry Johnson testified as an expert in crime scene investigation and opined that "the packaging of materials in the case did not meet professional standards" because items were not wrapped separately. DNA expert Lisa Calandro eliminated petitioner as the donor of the semen found on Mrs. Muncey's underwear and nightgown.

Howard Bragdon, manager of laboratory operations for DCI Laboratory in Nashville testified for petitioner as well. This laboratory had performed the blood analysis for petitioner at trial. Bragdon noted that he took possession of the blue jeans, the victim's clothes and fingernail scrapings, as well as blood from both the victim and petitioner, on October 29, 1985. The next day, after transporting them to Nashville, he took pictures that showed dried blood around the upper left corner of the box in which the items had been contained. According to the district court, "Mr. Bragdon admitted that it was his custom to inspect the condition of serological evidence when he took possession and that there was no notation on the receipt of spillage. Mr. Bragdon also admitted that he had no way of knowing the condition of the blood samples at the time of the FBI's serological testing." Memorandum Opinion, February 16, 2000 at 35.

The court characterized Dr. Blake's testimony as follows:

> Dr. Blake testified that there was no total chain of custody. Also, according to Dr. Blake, Dr. Carabia [the coroner] failed to refrigerate and preserve the blood in the tubes, failed to seal the tubes of blood, which could result in spillage, and failed to package the items individually.
>
> Dr. Blake's testimony was based upon his review of photographs of the physical evidence, and was relevant to Dr. Blake's opinion that the blood on petitioner's blue jeans resulted from spillage of Mrs. Muncey's blood in the laboratory tubes. . .
>
> . . . .
>
> Dr. Blake testified that if fresh blood had spilled on the blue jeans while Mrs. Muncey was alive, and then dried, the enzymes on the jeans would not have deteriorated to the same extent as the enzymes in the blood taken from Mrs. Muncey. From this, Dr. Blake concluded the blood was not spilled on the jeans while Mrs. Muncey was alive but rather came from the spillage of the test tubes.
>
> Dr. Blake also testified with respect to the age of Mr. House's bruises, based upon photographs taken from the state court record. Dr. Blake estimated some bruises at one to two days old; others at five to six days old. Also, in Dr. Blake's opinion, the bruising on Mr. House's right ring finger was an injury from being mashed; it was not consistent with striking someone.

Memorandum Opinion, February 16, 2000 at 37-38.

The district court also recapped the testimony of the blood spatter expert Ms. Sutton, who concluded that "the blood stains could not have resulted from spillage because the blood and mud would have had to have spilled at the same time." Memorandum Opinion, February 16, 2000 at 42.

With respect to the blood, the court determined,

> Without question, one or more tubes of Mrs. Muncey's blood spilled at some time. It is likely the spillage occurred prior to the receipt of the evidence by [the] laboratory hired by Mr. House's trial attorney. Based upon the evidence introduced during the evidentiary hearing, however, the court concludes that the spillage occurred after the FBI crime laboratory received and tested the evidence.
>
> . . . [T]he enzyme deterioration, as well as Mr. Muncey's alleged confession and the blood spillage, does not negate the fact that Agent Scott saw what appeared to be bloodstains on Mr. House's blue jeans when the jeans were removed from the laundry hamper at Ms. Turner's trailer and that the blood was in fact from Mrs. Muncey.

Memorandum Opinion, February 16, 2000 at 45-46.

Petitioner not only presented evidence to the district court that undermined the case against him, he also offered an alternative theory of the crime: that Mr. Muncey killed his wife.

At the evidentiary hearing, petitioner produced witnesses who testified about Mr. Muncey's alcoholism and also his physical abuse of his wife. One acquaintance, Kathy Parker testified, "[Mrs. Muncey] was constantly with black eyes and busted mouth." A friend, Hazel Miller, testified that Mr. Muncey told her that was going to get rid of his wife a few months before her death. In the district court, Mr. Muncey acknowledged that he "smacked" his wife at least once.

As for the day of the murder, Mr. Muncey was supposed to help dig a grave. He went over to his father's place, helped to work on some cars, then dug the grave. However, rather than go home, he went to the weekly dance at the C & C Recreation Center where he testified that he stayed until about midnight. He then arrived home to find his wife missing.

Kathy Parker told the district court that Mr. Muncey visited her on a Friday night in 1985 after the murder. Friends were sitting around drinking when Mr. Muncey "started crying and going on and rambling off." According to Parker, he was "[t]alking about what happened to his wife and how it happened and he didn't mean to do it, but I don't know exactly what all was said." She went on, "[H]e said they had been into an argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for it to happen." He was drunk when he made this confession. After hearing it, Parker claimed, "I freaked out and ran him off." The next day her mother took her to the courthouse to tell someone about it. However, "I never did really get to talk to anybody." When the district court asked her about the motivation behind her testimony, she replied, "An innocent man is in jail."

On cross-examination, Parker testified that she had tried to come forward but no one seemed interested. She had had seven or eight beers on the night of the confession.

Parker's sister, Penny Letner, also heard the confession from Little Hube. Once again, she recalled that he was "pretty well blistered." According to Letner,

> He said he didn't mean to do it. That she was "bitching him out" because he didn't take her fishing that night. that he went to the dance instead. He said when he come home that she was still on him pretty heavily "bitching him out" again and that he smacked her and that she fell and hit her head. He said he didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder.

Letner had not been drinking. She was frightened by the talk and left the party. As a young mother of 19, she was too scared to report the confession.

Based upon the statements of Letner and Parker, petitioner posits the following scenario:

> When Mr. Muncey got home, he and his wife resumed their fight. He hit her at least once and she fell. When he checked, he found that he had killed her. He took her body down by a creek running near their home and hid it with some brush and branches.
>
> Whether Mr. Muncey ever went back to the dance is uncertain. Constable Wallace, who was providing security at the dance, testified that he never saw Mr. Muncey return after he left around 10:30 p.m. Mr. Muncey claimed during the hearing that he never left the dance until it broke up some two or more hours later.

Petitioner's brief at 33-34. Petitioner also points out that Dennis Wallace(3) did not think that Mr. Muncey seemed upset when he reported his wife's disappearance or when the body was recovered. Also, Mr. Muncey asked a neighbor, Artie Lawson, the next morning to tell people that he was at the dance. Since she had not attended it herself, she declined. Her daughter, Mary Atkins, however, testified that she not only saw Little Hube at the dance, but that she saw him hit his wife.

The district court discounted the testimony of Letner and Parker: "The court is not impressed with the allegations of individuals who wait over ten years to come forward with their evidence." Memorandum Opinion, February 16, 2000 at 45. Instead, the court credited the testimony of Lora Muncey Tharp, the daughter who testified at both the trial and evidentiary hearing:

> While in bed, she heard a deep voice saying her dad had been involved in a wreck next to the creek. Sometime later she and her brother got up and went looking for their mother. They went to the neighbors and looked up and down the driveway. She did not see anything out of the ordinary in the house; nothing was out of place and there was no sign of a struggle.
>
> According to Ms. Tharp, her parents got along fine. They argued, but she did not recall any physical pushing or hitting. If they argued, she could hear them if she was in her bedroom. The family did not have air conditioning in the home. She did not hear any arguments that night.
>
> The court found Ms. Tharp a very credible witness. She had no reason to lie. Her testimony during the evidentiary hearing was consistent with her trial testimony.

Memorandum Opinion, February 16, 2000 at 12-13.

As the preceding recitation makes clear, petitioner has mounted a concerted attack on his

conviction. To prevail, however, he must do more than raise questions about the reliability of portions of trial testimony or the manner in which physical evidence was handled or analyzed; he must show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. Moreover, in weighing the new evidence, we review the factual findings of the district court for clear error. *Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001).

The following facts that implicate petitioner are undisputed: he lied to investigators about his whereabouts on the night of the murder; he gave inconsistent versions of the origins of the scratches and bruises on his hands and arms; he was seen near where the body was discovered on the day after the murder; he lied about what he was wearing on the night of the murder; blood and mud splattered blue jeans belonging to petitioner were found at the bottom of Ms. Turner's laundry hamper; petitioner has a deep voice and Lara Muncey testified that the man who came to the trailer on the night of the murder had a deep voice; and, according to Dr. Sutton, the blood and mud found on petitioner's blue jeans had been mixed together, which "certainly eliminates the possibility of any stains being created by contamination in an evidence container."

With respect to petitioner's theory that Mr. Muncey committed the murder, we defer to the finding of the district court that Ms. Letner and Ms. Parker, who allegedly heard Mr. Muncey's confession, were not credible. Furthermore, the content of Ms. Letner's testimony - that Mr. Muncey killed his wife during an argument in their trailer - is belied by the presence of the children in the trailer, who heard no such confrontation, and the lack of any signs of a struggle.

Petitioner has succeeded in showing that the semen attributed to him during the trial was that of Mr. Muncey and that, at some point, the blood evidence appears to have been mishandled. However, the district court concluded that "the spillage occurred after the FBI crime laboratory received and tested the evidence," a factual conclusion that is not clearly erroneous.

Despite his best efforts, the case against petitioner remains overwhelming. We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of new evidence.

IV.

The judgment of the district court is **affirmed**.

DISSENT

MERRITT, Circuit Judge, dissenting. I dissent from the majority opinion affirming the [illegible]al of Petitioner Paul House's petition for habeas corpus under 28 U.S.C. § 2254. As with many [illegible]r Tennessee death penalty cases, this case had several errors in the trial phase which necessitate a new trial. I have a serious question about whether House is guilty of the crime for which he was convicted.

1. *The New Semen Evidence Disproves Rape as the Motive.*

First, the new evidence pertaining to the semen found on the victim's underwear and nightgown undermines the State's proffered motive of rape at trial and thus raises a serious question as to whether a jury would have found Mr. House guilty, and would have used the inference of rape as an aggravating factor in sentencing him to death. At the district court habeas hearing, House offered undisputed testimony from DNA expert Lisa Calandro that eliminated House as a potential donor of the semen. Ms. Calandro concluded that the victim's husband was the donor of the semen. In addition, there is no other physical evidence supporting rape or attempted rape of the victim. There was no evidence of penetration, the victim's clothing was not ripped or removed, and there were no bruises on the victim indicating an attempted rape. The State seems now to concede these facts.

Yet, at trial, the State argued in its closing rebuttal that the Petitioner's motive in his purported killing of the victim was rape, based on the inference that the semen on the victim's clothing was his. The State presented the following argument:

> Now you may have an idea why he did it. The evidence at the scene which seemed to suggest that he was subjecting the lady to some kind of indignity, why would you get a lady out of her house, late at night, in her night clothes, under the trick that her husband has had a wreck down by the creek? Why is it that you want to get her down by the creek? . . . . [I]t is either to keep her from telling what you have done to her, or it is that you are trying to get her to do something that she nor any mother on that road would want to do with Mr. House. . . . and you kill her because of her resistance.

Tr. Trans. Vol. IX, p. 1302-03. Because the only motive presented by the State at trial was based on evidence now completely discredited, I would issue the writ requiring a new trial. This new evidence obviously also mandates a new sentencing hearing because rape was the underlying basis for one of the three aggravating factors presented at trial. Coupled with the prior conviction for sexual assault, the State's assertion that the jury infer rape added a level of egregiousness to the crime that would not otherwise have been present and as a result was particularly prejudicial to the jury's determination of aggravating and mitigating circumstances at the sentencing phase.

Both the majority here and the lower court assert that because the aggravating circumstance at issue is rape and/or kidnapping, disproving the rape is not enough to create reversible error. It is clear, however, based on the information before the jury, that rape, not kidnapping, was the action resulting in the finding of an aggravating circumstance. Because the new evidence contradicts the jury's inference that House raped the victim, I find that this error is one that might reasonably be thought to have had "substantial and injurious effect or influence" on both the jury verdict and death sentence. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

2. *The Husband's Confession Tends to Disprove the Crime.*

Second, I am troubled by the cursory treatment of two independent accounts of the confession of Hubert Muncey that he -- the husband -- committed the crime. Both Kathy Parker and Penny Letner provided consistent accounts of Muncey's admission of guilt. There was no evidence in the record that challenged the reliability of these statements or suggested any bias or motive for either to be untruthful. Also, the confessions are supported by the well documented domestic abuse of the victim by Muncey and his actions the following morning when he asked a neighbor, Artie Lawson, to lie for him and provide an alibi by testifying that he was at the dance for the entire evening.

The district court, however, discounted the confessions because both witnesses had waited over ten years to come forward. In addition, the district court found that the testimony of Lara Muncey Tharp contradicted the testimony of Letner and Parker because Tharp did not hear any struggle and none of the furniture was out of place in the house. This interpretation is erroneous because neither Letner or Parker asserted that Muncey's purported fight with his wife occurred *inside the house*. They both testified that he went home from the dance and got into the fight with his wife, but did not describe *where* the fight occurred. Muncey could have asked his wife to come outside of the house in order to not disturb their children. Tharp's testimony that her father was not abusive toward her mother, despite the common knowledge in the community that he physically abused her, further supports the idea that Muncey might ask his wife to leave the house in order to express his displeasure with her.

In addition, while Tharp may appear as a credible witness now that she is in her twenties, Tharp was only ten years old at the time of the incident, raising a question as to how accurate or specific her memory may be. For instance, at the initial trial, Tharp described a car arriving at the house prior to her hearing the low voice that told her mother that her father had been in a wreck. At the district court hearing, however, Tharp denied hearing a car that night. It should be for a state trial jury to weigh the credibility of a daughter of a potential suspect with both emotional and personal incentive to protect her father. It is not for us or the District Court to decide this question or indulge in a presumption that she has an infallible memory of events that happened in the middle of the night when she was ten years old. As a result of the underlying facts, I find that the district court committed clear error by discounting the credibility of *two* independent, unbiased individuals without any rationale other than the time between the confession and the testimony before the district court. The state trial court should weigh this evidence at a new time.

3. *The Blood Evidence Creates a Serious Doubt.*

Third, analysis of the blood on House's jeans raises serious doubts as to whether the blood came directly from the victim or spilled on the jeans from vials of blood of the victim sent with the jeans to the lab. Agent Bigbee tested the blood from Ms. Muncey's body and the blood found on Paul House's jeans. There was a clear match, revealing that the blood on his jeans belonged to the victim. A closer examination of the forensic evidence, however, suggests that the blood on the jeans may have come from the forensic sample taken from Ms. Muncey's body, not from her body as she was murdered.

The most significant piece of forensic evidence suggesting this conclusion is the consistency in enzyme degradation between the sample from Ms. Muncey's body and the five samples from the jeans. Enzymes are proteins which have a complex molecular structure. Their fragile structure is only maintained by the proper environment provided in the human body. Over time, enzymes degrade; that is, they lose their structure and shape and become inactive. The blood tests performed by Agent Bigbee on the victim's blood and the five samples from the defendant's jeans looked for the presence of various enzymes (to see whether they had denatured or not) in the blood. Of the ten enzymes tested, six had conclusive results. All six enzymes matched. Thus, it is reasonable to infer that the enzymes in the blood on the jeans degraded at the same rate as the blood in the sample taken from the victim's body. Because they degraded at the same rate despite being in two different media, it appears that the enzymes came from the same sample, that is, the blood on the defendant's jeans came from the sample taken from the victim, not the victim herself.

In his report, Dr. Cleland Blake, Assistant Chief Medical Examiner for the State, reached the

conclusion that the blood on House's jeans came from the samples taken from the victim's body, presumably based on theory of enzmatic degradation explained above. He did not, however, explain how he reached his conclusions in his report. Recognizing the significance of Blake's conclusion to the question of House's innocence, the district court inquired about the enzymatic degradation of the blood stains, but did not receive a satisfactory explanation from Dr. Blake. Because Dr. Blake neglected to explain in layman's terms the method by which he reached his conclusion, the district court relied on the testimony of Agent Bigbee who opined that Blake's theory was incorrect. I believe that on the surface, Blake's findings are compelling and require further exploration. Because of the paramount significance of these findings to the question of House's innocence, an independent analysis by a blood expert of Blake's theory of enzymatic degradation is needed to determine whether the blood on House's jeans came from the victim herself or from a forensic blood sample. In addition, I would, to the extent possible, have the untested fingernail scrapings of the victim examined to determine whether there is any DNA evidence.

Standing alone, one might argue that the similarity in enzymatic activity was merely coincidental. However, there is additional evidence suggesting that the sample in the vials of blood may have been tampered with. As Dr. Blake noted, there was no unbroken chain of custody. Larry Johnson, an expert in crime scene investigation, similarly stated that "the packaging of the materials in the case did not meet professional standards."

Furthermore, there is blood missing from the sample taken - one of the four vials is empty and another is only half-full - but Agent Bigbee used only one-fourth of a vial in performing his tests. The photograph of the styrofoam container clearly shows that blood spilled in the container. The tape on the container was mysteriously cut and retaped contrary to standard procedure. The label on the container said it contained the semen and the blood evidence, but the semen evidence was shipped separately. Also, the location of the blood on the jeans is odd. The five spots were found on the outside left leg, on the inside left thigh, on the *inside* right pocket, outside the right pocket, and on the right cuff, respectively.

The testimony of Pauline Sutton also raises questions as to whether the jeans were tampered with. She noted that some of the blood stains were mixed with mud. The National Weather Service records show that it had not rained for three days prior to the murder, and photographs of the crime scene showed no mud present. Lastly, there was no mud on the victim's nightgown. All of this evidence raises serious questions as to how the mud got on the jeans. The district court relies on TBI Agent Charles Scott's testimony that the jeans had "reddish brown" stains when he took them from the clothes hamper. Mr. Scott, however, admittedly did not thoroughly examine the jeans. Because he could have tampered with the jeans, and because the forensic evidence does not support his testimony, a new trial is warranted in light of all the problems in this death case.

In sum, I believe the new evidence of the semen, the confessions, and the enzymatic degradation make it more likely than not that a reasonable doubt would be raised in the mind of any reasonable juror. Accordingly, I would grant the writ of habeas corpus.

Footnotes

[1] After returning from his "walk," appellant suggested marriage to Ms. Turner for the first time in their relationship. It was at least arguable that he thought by this means her testimony could be rendered inadmissible by the husband-wife privilege.

[2] "Little Hube" is the nickname of the victim's husband, Hubert Muncey.

[3] Dennis Wallace was the Chief of Police of Luttrell, the nearest town.

FILED

Feb 16 7 49 AM '00

U.S. DIST. COURT
EASTERN DIST. TENN.

BY DEP. CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

PAUL G. HOUSE,

Petitioner,

v. 3:96-cv-883

RICKY BELL, Warden,

Respondent.

ORDER

In accordance with the accompanying Memorandum Opinion, the petition for the writ of habeas corpus is **DENIED**. The stay of execution previously entered in this matter is **VACATED**. A certificate of appealability **SHALL NOT ISSUE**.

ENTER:

James H. Jarvis
UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT

Deputy Clerk

2/16/00
176 73 [286]

FILED

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Respondent.

MEMORANDUM OPINION

This is a petition for the writ of habeas corpus under 28 U.S.C. §2254; the petitioner is presently incarcerated on death row. For the following reasons, the petition will be **DENIED**.

I. Procedural Background

The state provided the court with copies of petitioner's state court proceedings. [Court File No. 4, Addenda 1-8; Court File No. 6, Addenda 9-39]. Petitioner Paul Gregory House was convicted of the first degree murder of Mrs. Carolyn Muncey and was

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sentenced to death by electrocution. His conviction and sentence were affirmed on direct appeal, *State v. House*, 743 S.W.2d 141 (Tenn. 1987), and he was twice denied post-conviction relief. *House v. State*, C.C.A. No. 28 (Tenn. Crim. App. December 15, 1989) (UNPUBLISHED DECISION, TEXT IN WESTLAW, 1989 WL 152742) [Addendum 12], *permission to appeal denied, id.* (Tenn. March 5, 1990) [Addendum 15], *cert. denied*, 498 U.S. 912 (1990) [Addendum 18]; *House v. State*, 911 S.W.2d 705 (Tenn. 1995) [Addendum 34], *cert. denied*, 116 S.Ct. 1685 (1996) [Addendum 39].

In his petition for federal habeas corpus relief, Mr. House raised fifty-six grounds for relief. The court granted the respondent's motion for summary judgment on the majority of the claims, finding that the claims were either correctly decided by the state court on the merits or procedurally defaulted. The court reserved ruling, pending an evidentiary hearing, on Mr. House's claims of actual innocence of the offense, actual innocence of the death penalty, and ineffective assistance of counsel based upon counsel's failure to adequately investigate Mr. House's guilt or innocence, failure to call all available witnesses that would have benefitted the defense, failure to adequately investigate mitigating circumstances, and failure to call appropriate witnesses or put on appropriate evidence during the penalty phase.

An evidentiary hearing was held on February 1, 1999, through February 3, 1999, and a transcript of the daily testimony was prepared. [Court File Nos. 274-276, respectively]. Written closing arguments were filed by the parties. [Court File Nos. 279-282]. The matter was taken under advisement. The following represent the court's findings of fact and conclusions of law. Fed. R. Civ. P. 52(a).

II. Findings of Fact

Carolyn Muncey lived with her husband, William Hubert ("Little Hube") Muncey, Jr., and two young children in Union County, Tennessee. Mr. Muncey was not home during the early evening of Saturday, July 13, 1985. Mrs. Muncey and her children visited a neighbor and returned home around 9:30 p.m. Her daughter testified she awoke later and heard a deep voice, that sounded like her papaw's, tell her mother that her father had been in a wreck. Her mother left the house crying. When Mrs. Muncey failed to return, the children went looking for her at their neighbors. Failing to find her, they came home and waited until their father arrived. *House*, 743 S.W.2d at 142.

Mrs. Muncey's badly beaten body was found the following Sunday afternoon around 3:00 p.m. Death was caused by a severe blow to her left forehead. Bruis. of her body, abrasions and blood indicated Mrs. Muncey had struggled fiercely. *Id.*

Mr. House was questioned by law enforcement officials and subsequently charged with the murder. The evidence against him was purely circumstantial. His girlfriend, Donna Turner, testified that, at approximately 10:45 p.m. on Saturday, July 13, Mr. House left the trailer they shared to take a walk. He returned about an hour later, panting, hot and exhausted, without his shirt or tennis shoes. She noticed numerous bruises and abrasions on his arms, hands and body, including the knuckle of his right ring finger. Mr. House told Ms. Turner he had been assaulted by some men, that he had lost his shoes, and had thrown his shirt away because it had gotten torn. *Id.* at 143-44.

Two witnesses testified that, on the following Sunday afternoon, they saw Mr. House emerge from a ditch along the road; he was wiping his hands with a dark cloth. They discussed the disappearance of Mrs. Muncey with him. Becoming suspicious, the two later returned to the spot and, looking down the bank, saw Mrs. Muncey's body partially concealed in the underbrush. *Id.* at 143.

Mr. House gave two statements to investigators; in both he denied any involvement in the murder and denied having left Ms. Turner's trailer Saturday evening. He also said he was wearing the same clothes on Sunday that he had been wearing on Saturday evening. However, investigators later discovered a pair of blood-stained blue jeans in the bottom of Ms. Turner's clothes hamper. The blood had characteristics consistent with the Mrs.

Muncey's blood and inconsistent with petitioner's blood. Also, fibers from the jeans were consistent with fibers found on Mrs. Muncey's clothes. In addition, semen stains, from a male secretor of the same type as Mr. House, were found on Mrs. Muncey's nightgown and underclothing. *Id.*

At sentencing, the State proved Mr. House's previous conviction for aggravated sexual assault. The jury imposed the death penalty, finding that the State had established three statutory aggravating circumstances: Mr. House had a prior felony conviction involving the use or threat of violence; the homicide was especially heinous, atrocious, or cruel; and the homicide was committed while Mr. House was committing or attempting to commit or fleeing from the commission of rape or kidnapping. *Id.* at 144.

Mr. House's claim of actual innocence is premised on his allegation that Mrs. Muncey was actually killed by her husband after an argument. He also alleges that Mrs. Muncey's blood got on his blue jeans during the transportation of the evidence to the crime laboratory of the Federal Bureau of Investigation (FBI) for testing. Mr. House's theory is that one or more of the vials of blood taken from Mrs. Muncey leaked during transit. Mr. House also posits the theory that the blood was spilled, either accidentally or intentionally, while the evidence was in the possession of law enforcement personnel before the transfer to the FBI.

At the evidentiary hearing, Mary Atkins, a native of Union County, testified that she went to a dance at the C&C Rec Hall in the Luttrell area of Union County on the Saturday night before Mrs. Muncey's body was found; she was not sure of the exact date. She saw "Little Hube" and his wife arguing in the parking lot, and saw "Little Hube" grab his wife and backhand her. She could not hear what they were arguing about. Mrs. Muncey then left the parking area on foot. Ms. Adkins learned the following Monday that Mrs. Muncey was dead.

According to Ms. Atkins, the parking area was well-lit. Even though Ms. Adkins admitted she went to the dance at the rec hall every Saturday night, she denied she could be mistaken about which Saturday night she saw the Munceys arguing in the parking lot.

Ms. Adkins testified that, prior to the week-end in question, she had seen bruises on Mrs. Muncey's face. According to Ms. Adkins, she grew up with "Little Hube," had not seen him for the last two years, and did not have any hard feelings or animosity toward him. She stated that no one had threatened her or coerced her into testifying.

Ms. Atkins' mother, Artie Lawson, a life-long resident of Union County, testified that, on Sunday morning of the week-end in question, "Little Hube" came to her house. He asked her to say, if anyone came to talk to her, that he was there for breakfast at her

house at six o'clock, which was not true. Even though Ms. Lawson was not at the dance, "Little Hube" also asked her to say she saw him at the dance that Saturday night. Ms. Lawson found out that Sunday evening that Mrs. Muncey was dead.

Ms. Lawson testified that "Little Hube" was and still is a good friend, that she had not seen him in a long time, that she had not had any disagreements with him, and that she saw him a lot before his wife died but not a lot after Mrs. Muncey died.

In response to the respondent's motion for summary judgment, petitioner filed the affidavit of Artie F. Lawson, which differed somewhat from her testimony during the hearing. Ms. Lawson testified by affidavit that, in the early morning hours of Sunday, July 14, 1985, William Hubert Muncey, Jr., came to her residence, told her that his wife was dead, and that he had found Mrs. Muncey's body. [Court File No. 194, Exhibit C]. However, in response to questioning by the court during the evidentiary hearing, Ms. Lawson testified that Mr. Muncey told her that Sunday morning that "his wife was gone" and that someone else told her that Mrs. Muncey was dead. Ms. Lawson also stated she did not know who found Mrs. Muncey's body. [Court File No. 274, p. 25].

Penny Letner, who grew up around Mr. Muncey, testified that, sometime after Mrs. Muncey's death, she was at a get together at the home of her sister, Kathy Parker, when "Little Hube" came to the residence. Ms. Letner was unsure of the date of the get together; Mr. House was incarcerated at the time and it was either just before or during the trial.

According to Ms. Letner, "Little Hube" was "pretty well blistered" and "was sitting there and he went to crying and was talking about his wife and her death and he was saying that he didn't mean to do it." [*Id.* at 28]. Ms. Letner testified that "Little Hube" said his wife was "'bitching him out'" because he went to the dance instead of taking her fishing and, when he came home from the dance, Mrs. Muncey "was still on him pretty heavily 'bitching him out' again and that he smacked her and that she fell and hit her head." [*Id.*]. Mr. Muncey told Ms. Letner he had to get rid of his wife because he "didn't want to be charged with murder." [*Id.*].

Ms. Letner left the house immediately after Mr. Muncey's statements because she was scared; she was nineteen years old and had a small child. She denied that she was drinking that night. She also denied having any problems or disagreements with "Little Hube."

Ms. Lemer did not report Mr. Muncey's statements to the police because she was scared and did not think the police would listen to anything she had to say. According to Ms. Lemer, she came forward at this time because an investigator for Mr. House's case started asking her questions and it was not right for a man to be in jail for something he did not do.

When asked what made it not right 13 years later, but okay for the intervening 13 years, Ms. Lemer answered: "There wouldn't nobody listen to me. Finally there was someone willing to talk to me." [*Id.* at 32]. However, when asked "Who did you try to talk to?", she answered, "Didn't try to talk to nobody. I didn't think they would listen to me." [*Id.*].

Ms. Lemer's sister, Kathy Parker, testified that the get together was on a Friday night during warm weather, although she was not sure of the date. She, some family members, and some friends were sitting around drinking when "Little Hube" walked in and sat down. After ten or fifteen minutes, he started crying and rambling off, "[t]alking about what happened to his wife and how it happened and he didn't mean to do it". [*Id.* at 37]. According to Ms. Parker, Mr. Muncey said "they had been into and [sic] argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for

it to happen." [*Id.* at 38]. Ms. Parker testified that Mr. Muncey was very intoxicated and very emotional at the time.

After his statement, Ms. Parker "freaked out and run him off." [*Id.*]. The next day she went to the Union County Sheriff's Department and tried to speak to the Sheriff. He was busy and sent her to a deputy, who sent her to someone else; she never did talk to anybody about it. According to Ms. Parker, she came forward now because an innocent man is in jail. She denied knowing Mr. House and also denied having any disagreement with Mr. Muncey.

Ms. Parker did not attempt to contact Mr. House's attorney during the trial and she did not contact the newspaper with her claim that an innocent man had been convicted.

Hazel Miller, a lady who had known Mr. Muncey all his life, testified that, several months prior to Mrs. Muncey's death, "Little Hube" came to her house and during their conversation said that "[h]e was upset with his wife, that they had had an argument and he said he was going to get rid of that woman one way or the other." [*Id.* at 48]. Ms. Miller denied any disagreement or falling out with Mr. Muncey, and denied she had been coerced into testifying.

Dennis Wallace testified he was the Chief of Police of Luttrell at the time of Mrs. Muncey's murder. That Saturday evening he was working the dance at the C&C recreation center. He saw "Little Hube" at the dance and saw him leave between 9:30 and 10:30 p.m. He did not recall seeing "Little Hube" return to the dance.

Later, around 1:40 a.m. Sunday morning, Mr. Wallace was dispatched by the Sheriff's Department to the Muncey home on a missing person's call. When he got to the home he found Mr. Muncey, who was intoxicated. Mr. Muncey told Mr. Wallace that his wife had been kidnapped. Mr. Muncey told Mr. Wallace when he got home, he fixed a sandwich, went to the bedroom, and found his wife was not in bed.

Mr. Wallace looked around the inside of the house while there and did not notice anything out of place, no furniture knocked over, and did not see any blood. Mr. Wallace and Mr. Muncey searched the weeds around the house looking for Mrs. Muncey. Mr. Wallace notified the Sheriff's Department, and turned in Mrs. Muncey's date of birth and her picture, which Mr. Muncey had given him. Mr. Wallace then worked all night, talking to neighbors and other people, trying to find Mrs. Muncey.

Mr. Wallace was present at the site where the body was found the next day, when "Little Hube" arrived. Mrs. Muncey's body was down an embankment, and there were a lot of people there. "Little Hube" was driven there by Mr. House. According to Mr. Wallace, when "Little Hube" arrived, he got out of the car and Mr. House ran in front of him, grabbed him, and held him back; they were looking back at where the body was. "Little Hube" did not seem to be upset.

Mr. Wallace had known "Little Hube" a long time and, for as long as he had known him, "Little Hube" had a reputation for drinking heavily. In Mr. Wallace's opinion, "Little Hube" is an alcoholic. "Little Hube" was drinking that morning when Mr. House brought him to where Mrs. Muncey's body was.

Lora Tharp, the Munceys' daughter, testified she was ten at the time of her mother's murder. That night she was home with her mother and brother. While in bed, she heard a deep voice saying her dad had been involved in a wreck next to the creek. Sometime later she and her brother got up and went looking for their mother. They went to the neighbors and looked up and down the driveway. She did not see anything out of the ordinary in the house; nothing was out of place and there was no sign of a struggle.

According to Ms. Tharp, her parents got along fine. They argued, but she did not recall any physical pushing or hitting. If they argued, she could hear them if she was in her bedroom. The family did not have air conditioning in the home. She did not hear any arguments that night.

The court found Ms. Tharp a very credible witness. She had no reason to lie. Her testimony during the evidentiary hearing was consistent with her trial testimony.

"Little Hube" Muncey testified that, on the Saturday his wife disappeared, he had helped dig a grave earlier in the day and then went to the dance without going home. Mr. Muncey's father was there where they were digging the grave. He also saw Gary Muncey that day. He stopped by Betty Herron's house that day; he usually stopped there every day to speak to them. That day he stayed for a couple of hours because he "would stop and talk to B. Wyrick and things every day" and they "would drink a few together." [Court File No. 276, p. 55].

The admission price to the dance was one dollar. Back then, the beer Mr. Muncey drank did not cost over two dollars a six-pack. Mr. Muncey testified that he got the money for the dance and to buy beer from odd jobs he would do.

According to Mr. Muncey, he went to these dances on a regular basis. Although he did not recall leaving and coming back to the dance that night, sometimes during a dance he would run up to the package store and come back.

The dance ended around midnight. Mr. Muncey drove straight home and saw the door standing partially open. That was not normal and caused him some concern. The windows were open, because the house was not air-conditioned, and the kitchen light was on.

According to Mr. Muncey, he went in and looked around, saw his kids in the bedroom but his wife was not in the bedroom. He looked around outside for her, because they did not have an inside bathroom, but she was not out there. He asked his children where their mother was, but they did not know. He got the kids and went to a neighbors' home to see if they had seen Mrs. Muncey. He, or someone at his request, called the authorities from the neighbors' and told the authorities his wife was missing. He then took his kids to his dad's house.

According to Mr. Muncey, his wife sometimes went to the dance with him, but that night he was already out and just stopped by. His wife did not mind him going to the dance without her. He had been drinking beer all day long but was not drunk. During that

time period, he would drink a few cans of beer on the way home from work and would drink quite a lot on week-ends. His wife did not object to his drinking. Although he and his wife had a few quarrels, their fights did not get physical in terms of pushing, shoving, or hitting.

Mr. Muncey testified that he dated Kathy Parker before his marriage, but not afterwards. He did not remember being at a gathering at either Ms. Parker's house or Ms. Letner's house around the time of the trial. During that time Mr. Muncey was drinking six to twelve beers every day. He denied ever telling anyone he was responsible for his wife's death and he denied that he killed his wife. He denied he was supposed to take his wife fishing that night instead of going to the dance.

Mr. Muncey denied seeing either his wife or Mary Atkins at the dance the night his wife disappeared. He recalled going by Ms. Lawson's house the next morning but did not recall asking her to say he was at the dance. He denied telling Ms. Miller several months before Mrs. Muncey's death that he was going to get rid of his wife.

Mr. Muncey went to school for four years. He farmed for a living, working for other people. The Munceys rented the house they lived in. The house did not have

running water; the hand pump to the well was torn up and they had to haul water from his father's or from the spring.

Mr. Muncey testified that he arose early the morning of Mrs. Muncey's murder. He and his wife had intimate relations that morning. Mr. Muncey thought he had informed the Tennessee Bureau of Investigation (TBI) about the couple's sexual relations. In the court's opinion, the fact that Mr. and Mrs. Muncey had sexual intercourse the morning of her murder suggests that there was at least a modicum of compatibility between the two of them.

Pam and Jerry Luttrell, who lived across the street from the Munceys, had a garden. Mr. Muncey denied knowing that his wife "would pick beans on the half" from the Luttrell's garden and sell them. [*Id.* at 57]. Mr. Muncey denied causing an argument with his wife that Saturday by taking the money she earned from picking beans and using it to buy beer and for admission to the dance.

At the time of Mrs. Muncey's death, Mr. Muncey weighed about 120 to 130 pounds; he's five eight and now weighs about 135 pounds. Petitioner submitted a picture of Mr. Muncey taken around the time of his wife's murder. [Petitioner's exhibit 36]. His wife was five six and weighed about the same as he did. She was as strong as he was.

The petitioner, Paul Gregory House, testified that, on Saturday, July 13, 1985, he was living with his girlfriend, Donna Turner, at her trailer. He helped his mother move during the morning or afternoon, then came back to the trailer where he stayed the rest of the day. Between 10:30 and 11:00 p.m., while Donna was ironing clothes and he was watching television, he decided to go for a walk. That was not something he would regularly do. He did not intend to go anywhere in particular. Mrs. Muncey's body was found 1.8 miles from where Mr. House lived.

Mr. House walked across the property down to the road and then to the left, away from the Muncey house. After he had been walking about 20 minutes, a truck pulled up behind him. There were at least two guys in the truck. The driver got out, said something, grabbed Mr. House by the arm, and started to jerk him around. Mr. House turned around and threw back with his left hand, hitting the driver. The driver let go and Mr. House starting running. He ran into some trees and heard at least one shot, maybe two. He ran through the woods for awhile.

When Mr. House came out of the woods onto the road, he knew where he was and headed back to Ms. Turner's house. He noticed he had lost a tennis shoe while running; he took the other one off and threw it because he was upset. When he got to the trailer, he noticed his shirt was missing. The front door to the trailer was locked. He knocked

on the side door and Ms. Turner let him in. He was sweating and breathing hard, and drank a soft drink to cool off. Mr. House thought he was gone from the trailer for about an hour.

Ms. Turner had locked the door because she thought Mr. House had gone to his mother's home. Ms. Turner said the two of them had been fighting, but Mr. House did not recall having an argument with her. Mr. House told Ms. Turner about the incident with the men in the truck.

The next day, Sunday, Mr. House heard that Carolyn Muncey was missing. Ms. Turner told him she had seen "Little Hube" drinking, so he went looking for "Little Hube" because he considered him a friend. He borrowed Ms. Turner's car, drove down Ridgecrest Road, missed the Muncey driveway and drove past it to Tazewell Pike, turned around and drove past the Muncey driveway again, and pulled in a dirt road. He parked there, got out, ran back, and looked up the Muncey driveway. When he saw the car was not there, he walked back to Ms. Turner's car. He then drove toward Tazewell Pike intending to go to a dead-end dirt road where people went to drink, thinking "Little Hube" might be there.

On the way, he saw Bill Hensley coming toward him in a blue car. Mr. House waved Mr. Hensley over and asked him if he had seen "Little Hube." Mr. Hensley said he hadn't seen him around there anywhere. Mr. House then pulled into the Muncey driveway, backed out and drove back down Ridgecrest Road to the dump. There were two men there dumping garbage, but they did not know "Little Hube." Mr. House then went to his mother's house.

Mr. House was questioned by TBI Agent Ray Pressnell on Sunday and by TBI Agent Charles Scott on Monday. He admitted that he lied to the TBI agents when he told them he never left Ms. Turner's home Saturday night, and that he lied when he told Sheriff Loy during questioning that he had on the jeans he was wearing Saturday night.

Mr. House did not tell Sheriff Loy or the TBI agents about being harassed by some guys in a truck and shot at that Saturday night. He did not recall telling his lawyer about the incident, either. Mr. House testified he lied to the TBI and sheriff because he was on parole and did not want to draw attention to himself.

Mr. House did not try to find his shirt because he did not know where he had lost it. According to Mr. House, the bruises and scratches on his hands came from te- -g down a shed sometime before Mrs. Muncey's murder.

Mr. House denied being down in the ditch where Mrs. Muncey's body was found. He testified that "[t]he closest I got to what you call the embankment was when I ran up from the dirt road up to the Clinton's driveway, looked up and saw Little Hube's car was not there and walked back on the other side of the road." [Court File No. 276, p. 98]. Mr. House testified that he parked on the dirt road and ran back to the Muncey's driveway, instead of driving to it, because he "didn't like driving on the narrow roads that much to start with." [*Id.*].

When asked specifically whether he had anything to do with Mrs. Muncey's murder, Mr. House answered: "No, I did not." [*Id.* at 107]. When asked whether he was involved in a sexual assault of Mrs. Muncey, he answered: "I did not kill her. I did not ever contemplate killing her. I did nothing to her other than be an acquaintance, I guess." [*Id.*].

Mr. House did not testify at his criminal trial, either during the guilt phase or the penalty phase, nor did he testify during post-conviction proceedings. His testimony in this proceeding marked the first time he has testified in a court of law with respect to Mrs. Muncey's murder. The court considered Mr. House's demeanor and found that he was not a credible witness.

Joe Ed Munsey testified by deposition. [Petitioner's exhibit 34a]. He was the assistant chief of police with the Maynardville Police Department at the time of Mrs. Muncey's murder. On the Sunday the body was found, Mr. Munsey was notified by dispatch that the Union County Sheriff's Department needed assistance on a homicide. He went to the sheriff's department and viewed the body.

Mr. Munsey did not interview any witnesses. He did not recall whether he helped package the evidence. He did accompany Bill Breeding when he took the evidence from the Union County Jail to the FBI crime laboratory in Washington, D.C. Mr. Munsey had no independent recollection of how the evidence was packaged or the circumstances under which the evidence was turned over to the FBI.

According to Mr. Munsey, "Little Hube" was a suspect in the case because he had a serious drinking problem and did not treat his wife very well. That was common knowledge in the community.

Charles W. McClure, Jr. testified by affidavit. [Petitioner's exhibit 34d]. At the time of Mrs. Muncey's murder, he was a Union County deputy sheriff. His only involvement in the case was to transport evidence from the Oak Ridge Hospital to the sheriff's department.

William Franklin Breeding testified by affidavit. [Petitioner's exhibit 34b]. At the time of the murder, he was an investigator with the Union County's Sheriff Department. He became involved in the case the day the body was found. The TBI had already been called in and he considered himself assisting the TBI.

The first thing Mr. Breeding did was go to the funeral home. He remembered collecting Mrs. Muncey's clothing as well as some hairs that she had in her hands; he thought he might have taken some photographs. He did not recall how he packaged the evidence to go to the laboratory or where the evidence was kept after it was packaged.

Mr. Breeding recalled interviewing several witnesses. He took pictures of Mr. House's abrasions on Sunday evening, the day the body was discovered. He thought he might have collected some physical evidence from Mr. House, such as hair and blood samples, at a later date. He also drove the evidence to the FBI crime laboratory in Washington, D.C. As far as Mr. Breeding recalls, he left for Washington late Tuesday following the murder and delivered the evidence the next morning, which was Wednesday, July 17, 1985.

TBI Agent Ray Pressnell testified by affidavit. [Petitioner's exhibit 34c]. He became involved in the case the day Mrs. Muncey's body was found. He interviewed Mr. House that evening and afterwards talked with others in the community. He also collected hair samples and fingerprints from Mrs. Muncey at the funeral home. Mr. Pressnell did not recall who collected Mrs. Muncey's clothing or how the evidence was packaged.

TBI Agent Charles Scott testified that he became involved in the investigation of Mrs. Muncey's murder, at the request of another agent, on the second day of the investigation. He took a statement from Mr. House and obtained a consent to search from Ms. Turner. He went to Ms. Turner's home and seized a pair of blue jeans from the clothes hamper in the bathroom. The jeans had "reddish brownish" stains that he suspected was blood on the upper part of the jeans and near the cuff; there was also some light colored mud that was not completely dry. [Court File No. 276, pp. 113-114 & petitioner's exhibit 17 (actual exhibit withdrawn and photographs of front and back substituted)].

Mr. Scott did not thoroughly examine the jeans at that time but rather folded them and put them in a paper bag. Mr. Scott did not recall ever seeing the jeans in a plastic bag.

Mr. House's trial attorney, Charles Burks, testified on behalf of petitioner. Prior to Mr. Burks' testimony, Mr. House's present counsel referred the court to diagrams and maps of the general location of the murder. [Petitioner's exhibits 1-4]. Mr. Burks identified the area, including the location where the body was found and the Muncey home, through a series of photographs that he had taken [petitioner's collective exhibit 11-1 through 11-11], as well as photographs taken by present counsel [petitioner's collective exhibits 27-1 through 27-6].

Mr. Burks has been practicing law since 1974. He was retained to represent Mr. House on the first degree murder charge. The theory of the defense was that Mr. House did not commit the crime. During his investigation of the case, Mr. Burks learned that "Little Hube" and his wife were not getting along and that the whereabouts of "Little Hube" that night were in question. "Little Hube" was a suspect in Mr. Burks' mind.

According to Mr. Burks, "Little Hube" was generally absent throughout the whole process: he did not appear at the preliminary hearing or the trial, and he did not testify at either hearing. Mr. Burks attempted to talk with "Little Hube;" he met with "Big Hube" ("Little Hube's" father), who told Mr. Burks that "Little Hube" had nothing to say and would not talk with him. Mr. Burks filed the appropriate discovery motions and motions for exculpatory evidence.

Mr. Burks testified that the State's proof was there was a sexual assault involved in the murder. Although Mr. House was not charged with rape or kidnapping, those were noticed by the State as aggravating factors. The State introduced, over objection, evidence of semen. Also, the State introduced the testimony of Billy Ray Hensley as to what he saw, as well as proof of the bruises and scratches on Mr. House, his statements to the TBI, and the blood on his blue jeans.

During the evidentiary hearing, Mr. Burks reviewed a report from the Forensic Services Department of the TBI , which referred to Mr. House's tennis shoes and indicated the absence of blood on the tennis shoes. [Petitioner's exhibit 6A]. Mr. Burks did not recall having seen that report before. That would have been relevant to Mr. Burks because, although there was blood on Mr. House's jeans near the cuff, there was no blood on the shoes he was wearing at the time of the offense. The shoes were found in the general area of Ms. Turner's trailer long after the murder.

Mr. Burks was shown a plastic bag with the notation "Blue jeans, number 1, 7-15-85 1:30 p.m., Donna Turner's residence Charles D. Scott, TBI, TBI case number 58-107." [Court File No. 275, p. 145 & petitioner's exhibit 24 (actual exhibit withdrawn and photographs substituted)]. The bag appeared to have blood stains on it. Mr. Burks was never shown that bag and did not know it existed. If he had known it existed, he would

have introduced it at trial and argued possible contamination. He also would have had it examined by his expert prior to trial. Mr. Burks testified that the plastic bag and the report on the tennis shoes were the type of information he sought pursuant to his discovery motion.

Mr. Burks was shown four pictures of the deceased. [Petitioner's collective exhibit 13(1-4)]. Mr. Burks had not seen those pictures before, although they would have been the type of discovery he was seeking. Had he seen those pictures, he would have discussed them with his consulting pathologist, Dr. Joe Parker. Mr. Burks had seen the autopsy report from the forensic pathologist [petitioner's exhibit 6-5] and did not recall any reference to the pictures in that report.

Mr. Burks was shown several TBI Memoranda, the subject of which was Carolyn Muncey. Mr Burks did not recall seeing any of the Memoranda before, although they contained the type of information he sought in discovery.

One Memorandum summarized the interview of Kathy Parker by TBI Agent Ray Pressnell. [Petitioner's exhibit 6a]. Ms. Parker quoted "Little Hube" as telling three men his wife was home and they could go get her because he did not care anymore. Mr. Burks

testified that if he had seen the Memorandum he would have pursued Ms. Parker as a witness.

Another Memorandum summarized an interview Agent Pressnell and Sheriff Loy had with Peggy Herron. [Petitioner's exhibit 6b]. According to the Memorandum, Ms. Herron's husband, J.B., had helped "Little Hube" look for his wife early that Sunday morning. When J.B. returned around 4:00 a.m. he told Ms. Herron that the Munceys' daughter "said that Jack Beeler came to the house and told Carolyn that [Mr. Muncey] had a wreck in his car." This information would have been important to Mr. Burks because Lora Muncey was the only witness who had heard the voice of whomever called her mother out of the house that night.

In addition, the Memorandum quoted Ms. Herron as saying Mr. Muncey had called Mrs. Muncey "a bitch and a slut recently," he had slapped Mrs. Muncey a year ago at Ms. Herron's house, and had hit Mrs. Muncey with his fists a year ago at a barbecue at his house. Mr. Burks would have used that evidence at trial to suggest that someone other than Mr. House had a motive for Mrs. Muncey's murder.

Mr. Burks was shown the TBI Memorandum summarizing the interview of Gary Muncey by Agent Pressnell and Sheriff Loy, in which Gary Muncey stated he saw Hubert Muncey, Jr. at the dance Saturday night. [Petitioner's exhibit 6d]. Prior to the trial, Mr. Burks was trying to determine the whereabouts of "Little Hube" the night of the murder and was not aware he was at the dance nor was he aware how the dance related to Carolyn Muncey.

Hubert Muncey, Sr. was interviewed by Special Agent Charles Scott. [Petitioner's exhibit 6e]. "Big Hube" stated that, on the Saturday in question, his son helped him dig a grave, ate supper with him, and left at approximately 8:00 p.m. to go to the dance. Again, that would have been relevant to Mr. Burks in trying to establish the whereabouts of "Little Hube" that day.

William Hubert Muncey, Jr. was also interviewed by Agent Scott along with Union County Detective William Breeding. [Petitioner's exhibit 6g]. This Memorandum would have been important to Mr. Burks because "Little Hube" admitted leaving the dance to go to the package store around the time of his wife's death.

In addition to the TBI Memoranda, Mr. Burks was shown two pages of handwritten notes from the TBI file on Carolyn Muncey, neither of which he had seen before. The first referenced the fact that Mrs. Muncey last had sexual relations with her husband Saturday morning, the day she disappeared from home. [Petitioner's exhibit 6f]. According to Mr. Burks, that would have been important to know because during the trial the State introduced evidence of semen on Mrs. Muncey's clothes and evidence of petitioner's secretor status.

The second note referenced the fact that Mrs. Muncey's children came to the home of Mike and Patricia Clinton around 10:35 p.m., trying to find their mother. [Petitioner's exhibit 6h]. That information would have assisted Mr. Burks with respect to the time Mrs. Muncey left her house with her assailant.

There was some confusion whether Mr. Burks was actually given the above TBI Memoranda and notes. The State was under the impression that the documents were in Mr. Burks' file. However, apparently when counsel for Mr. House copied Mr. Burks' file for the State, the TBI documents were inadvertently copied as well and included with the file.

Mr. Burks did acknowledge, after reviewing his file, that he in fact interviewed "Little Hube" and learned he had been at the dance. He also interviewed Ms. Herron, who told him the Munceys' daughter had said different things at different times and also told him about physical altercations between Mr. and Mrs. Muncey. Mr. Burks could not recall why, as a matter of strategy, he decided not to use Ms. Herron as a witness.

Mr. Burks reviewed the notes of his initial interview with Mr. House. [Respondent's exhibit 25]. Mr. House did not tell Mr. Burks that he had left Donna Turner's trailer that night. Ms. Turner first told police that Mr. House was at her trailer all night. She later recanted. Mr. Burks admitted that Ms. Turner's changing her statement was very damaging to the defense. Mr. Burks' notes also reflect that the pictures of Mr. House's cuts and bruises were taken on both the Sunday and the Wednesday following Mrs. Muncey's murder.

Mr. Burks recalled that during the trial his client spoke out in front of the jury. That concerned Mr. Burks because Mr. House has a deep voice and the daughter had testified that whoever called her mother out had a deep voice.

Mr. House did not testify at either the penalty phase or sentencing phase of the trial. According to Mr. Burks', throughout the course of his representation, Mr. House was adamant he was innocent of the murder. Remorse is a mitigating factor the jury may consider in sentencing. Mr. Burks testified that, since the jury had found Mr. House guilty and since Mr. House would not exhibit remorse for the murder, Mr. Burks recommended Mr. House not testify at sentencing. Instead, his mother testified on his behalf at sentencing.

As stated above, the court in this proceeding found Mr. House was not a credible witness. Thus, the court understands Mr. Burks' recommendation that his client not testify before the jury.

Larry Johnson, a detective with the Knox County Sheriff's Department, testified on behalf of Mr. House as an expert in the area of crime scene investigation. In Detective Johnson's opinion, the packaging of materials in the case did not meet professional standards. That opinion was based upon a review of reports as well as photographs of the packaging materials shown him by petitioner's investigator. [Petitioner's collective exhibit 33].

According to Detective Johnson, it appeared that all of the evidence, although separately wrapped, was placed into one container for either transportation or shipment. Detective Johnson testified that all samples, such as victim's clothing and suspect's clothing, or victim's blood and suspect's blood, should be kept separated, labeled and sealed to avoid any transfer of evidence.

Detective Johnson testified that Mrs. Muncey's bra and housecoat should not have been placed in the same paper bag because of the danger of transfer. He also testified that her underwear should not have been placed in a plastic container because plastic draws moisture and does not allow the material to breathe. If the clothing item contained body fluids such as blood or semen, the composition of the fluids starts breaking down.

Detective Johnson had also been told that one of the blood samples had come unsealed in transport and had been shown a picture of a vial that the cork had come out of. However, Detective Johnson did not see the evidence at the time it was packaged for shipment to the FBI laboratory and had not talked with any of the people who packaged the evidence for shipment. Detective Johnson did not know when the cork actually came out of the blood vial.

Detective Johnson further testified as to the importance of maintaining the integrity of the crime scene by keeping people away. Based upon his review of photographs of the roadway next to the crime scene [petitioner's collective exhibit 12], he saw several non-law enforcement people present. However, he did not know how many people were actually at the crime scene itself.

Lisa Calandro also testified as an expert witness on behalf of Mr. House. She works for Forensic Analytical in Hayward, California, and is supervisor of the DNA section, which does forensic DNA analysis and biological evidence analysis. Ms. Calandro was involved in testing for semen stains on Mrs. Muncey's clothing, specifically her housecoat [petitioner's exhibit 14a (actual exhibit withdrawn and photographs of front and back substituted)], her nightgown [petitioner's exhibit 15a (actual exhibit withdrawn and photographs of front and back substituted)], and her underwear.

Semen was found on Mrs. Muncey's underwear and nightgown. Ms. Calandro was provided with samples of Mr. House's blood. As a result of DNA testing, he was eliminated as the donor of the semen.

Ms. Calandro also examined the plastic bag in which Mr. House's blue jeans were stored. [Petitioner's exhibit 24 (actual exhibit withdrawn and photographs substituted)]. She found blood stains on the exterior of the bag, but not on the interior of the bag.

Howard Bragdon, manager of laboratory operations for DCI Laboratory in Nashville, Tennessee, testified on behalf of Mr. House. DCI was formerly DiaClin Laboratory, Inc., and was the laboratory that Mr. House's trial attorney, Mr. Burks, used for blood comparison and analysis. According to the property receipt, on October 29, 1985, Mr. Bragdon took possession of the following items from the TBI: the blue jeans; Mrs. Muncey's nightgown, bra, housecoat, and panties; Mrs. Muncey's fingernail scrapings; samples of Mrs. Muncey's and Mr. House's blood; and a piece of plastic. [Respondent's exhibit 11].

Mr. Bragdon transported the evidence back to Nashville and secured it until the following morning when the materials were distributed for testing. That day, Mr. Bragdon took photographs of the tubes of blood samples and the container in which they were packaged. [Petitioner's collective exhibit 8]. The photographs showed dried blood around the edges of the left upper corner of the box and dried residue on the top of one of the tubes.

Mr. Bragdon testified that, at the time, DiaClin was heavily involved in paternity testing. The laboratory regularly transported blood and was not accustomed to mishandling the blood. However, Mr. Bragdon admitted that it was his custom to inspect the condition of serological evidence when he took possession and that there was no notation on the receipt of spillage. Mr. Bragdon also admitted that he had no way of knowing the condition of the blood samples at the time of the FBI's serological testing.

Mr. House's next expert witness was Dr. Cleland Blake. Dr. Blake is a forensic pathologist, an assistant State Chief Medical Examiner, and a consultant in forensic pathology to the TBI. His opinions were based upon his review of the TBI file, including the autopsy report [petitioner's collective exhibit 6], the FBI file [petitioner's collective exhibit 7], photographs of the physical evidence [petitioner's collective exhibits 33(1) - 33(9)], photographs of the victim [petitioner's collective exhibits 13(1) - 13(4)], and photographs of Mr. House's bruises and abrasions which were taken from the state court record [petitioner's collective exhibits 9(1) - 9(7) & 9(9)].

The autopsy of Mrs. Muncey was performed by Alex G. Carabia, M.D. Dr. Blake had several criticisms of the terminology used in the autopsy report, such as Dr. Carabia's use of the term "abrasion" instead of "laceration" and his reference to reflection o. : "skull cap" rather than reflection of the "scalp." [Court File No. 275, pp. 33-36]. Dr.

Blake also criticized the fact that photographs were not taken during the autopsy. Nevertheless, Dr. Blake essentially agreed with Dr. Carabia's conclusion that Mrs. Muncey's death was caused by a blow to the left side of her head, which resulted in a contrecoup injury of subdural hematoma to the right side of her brain.

The blow to the head was in the general area of the laceration on Mrs. Muncey's left temple, visible in one of the photographs of the victim. [Petitioner's exhibit 13(3)]. Other photographs shows blood staining on both sides of Mrs. Muncey's clothing. [Petitioner's exhibits 13(2), 14a, & 15a]. The photograph of the body where it was discovered shows Mrs. Muncey lying on her right side. [Petitioner's exhibit 13(1)]. According to Dr. Blake. the laceration would have spurted blood, although not a great amount. In Dr. Blake's opinion, at some point after the blow, Mrs. Muncey was erect, either sitting or slouched vertical. That is how the blood came to be on her left side. After she was placed in the ditch, blood drained down to her right side, staining her clothes on that side.

In Dr. Blake's opinion, the blow to Mrs. Muncey's head was not consistent with a blow from a fist. Rather, she was struck with a hard, sharp object.

Dr. Blake found fault with Dr. Carabia's handling of the blood and other biological specimens. Dr. Blake testified that there was no total chain of custody. Also, according to Dr. Blake, Dr. Carabia failed to refrigerate and preserve the blood in the tubes, failed to seal the tubes of blood, which could result in spillage, and failed to package the items individually.

Dr. Blake's testimony was based upon his review of photographs of the physical evidence, [petitioner's collective exhibit 35], and was relevant to Dr. Blake's opinion that the blood on petitioner's blue jeans resulted from spillage of Mrs. Muncey's blood in the laboratory tubes. Dr. Blake admitted there was nothing in the FBI report to indicate any blood spillage or leakage, only that the blood had undergone hemolysis, which could have occurred due to the fact there was no preservative in the tubes. Also, Dr. Blake admitted he could not tell exactly when the spillage occurred.

Dr. Blake reviewed the genetic marker analysis summary, which was prepared by the FBI as a result of that agency's examination of known specimens of Mrs. Muncey's blood and the blood found on Mr. House's jeans. [Petitioner's exhibit 7-4-2, found at collective exhibit 7, tab 4, p. 2]. According to Dr. Blake, the same amount of enzymes deteriorated on the blue jeans as in the sample of Mrs. Muncey's blood. This conclusion

was based on the reference to "inc" which Dr. Blake took to mean "incomplete penetration of the enzyme." [Court File No. 275, pp. 116, 119].

Dr. Blake testified that if fresh blood had spilled on the blue jeans while Mrs. Muncey was alive, and then dried, the enzymes on the jeans would not have deteriorated to the same extent as the enzymes in the blood taken from Mrs. Muncey. From this, Dr. Blake concluded the blood was not spilled on the jeans while Mrs. Muncey was alive but rather came from the spillage of the test tubes.

Dr. Blake also testified with respect to the age of Mr. House's bruises, based upon photographs taken from the state court record. [Petitioner's collective exhibits 9(1) - 9(7) & 9(9)]. Dr. Blake estimated some bruises at one to two days old; others at five to six days old. Also, in Dr. Blake's opinion, the bruising on Mr. House's right ring finger was an injury from being mashed; it was not consistent with striking someone.

Meghan Clement appeared as an expert witness for the respondent. The parties stipulated that Ms. Clement is qualified as an expert in the area of forensic DNA analysis, that the blood taken from the cuff area of Mr. House's jeans had a statistical similarity to blood taken from Mrs. Muncey's daughter, and that the semen found on Mrs. Muncey's clothes came from Mr. Muncey.

Dr. Alex Carabia appeared for the respondent and testified that he was the pathologist who performed the autopsy on Mrs. Muncey. He agreed with Dr. Blake that Mrs. Muncey was killed by the blow to the left side of her head. Dr. Carabia did not believe the injury was consistent with Mrs. Muncey having fallen and hit her head against the edge of a coffee table.

Dr. Carabia testified that he drew blood directly from Mrs. Muncey's thoracic cavity with a syringe, poured the blood into a vacutainer tube, and put the cap back on the vacutainer tube. He did not seal the tubes. He put the specimens upright in a four by six box and placed the box in the postmortem refrigerator for safekeeping while he finished the post-mortem examination. He then took all the samples to the bacteriology department and placed them in a refrigerator to be picked up later.

Paul David Bigbee, a special agent with the FBI, testified on behalf of respondent as an expert in forensic serology. At the time of Mrs. Muncey's murder, Agent Bigbee was a supervisory special agent and forensic serologist at the FBI laboratory in Washington, D.C., and he conducted the serological tests in the case.

Agent Bigbee testified that, pursuant to FBI policy, if evidence is contaminated in any manner, such as by spillage or leakage, it will be sent back without having been examined. He did not recall any leakage or spillage of blood in the items submitted to him for examination.

Agent Bigbee was the one who prepared the genetic marker analysis summary [respondent's exhibit 6 (actual exhibit withdrawn and photograph substituted)] upon which Dr. Blake based his opinion that the blood on Mr. House's blue jeans was the result of spillage. He disagreed with Dr. Blake's conclusion. Agent Bigbee testified that results from the analysis of the blood on the blue jeans differed from the results of the analysis of the liquid blood. Also, according to Agent Bigbee, the term "inc" stood for "inconclusive," which in turn meant the enzyme was present but could not be conclusively grouped. [Court File No. 276, p. 140]. Agent Bigbee had no idea what Dr. Blake meant by "incomplete penetration." [*Id.*].

Agent Bigbee was shown the styrofoam box in which the evidence was shipped from the TBI to the FBI. [Petitioner's exhibit 22 (actual exhibit withdrawn and photographs 22a-c substituted)]. The box was wrapped on all four sides with orange Tennessee Crime Laboratory tape. The tape had been slit on each side where the top joined the bottom.

Depending on how the lid was placed on the bottom, the orange tape either lined up at the slit or was uneven.

Agent Bigbee admitted that he did not know when the orange tape was put on the box. The petitioner's theory was that, before the FBI received the styrofoam box, the tape was slit, the box opened, some blood spilled and contaminated the blue jeans, and then the top was replaced and resealed with more orange tape.

Paulette Sutton also testified as an expert witness on behalf of the respondent. Ms. Sutton is a licensed medical technologist and clinical laboratory scientist; she also holds a certificate in bloodstain pattern interpretation. The parties stipulated Ms. Sutton's expertise in blood spatter analysis. In preparation for her testimony, Ms. Sutton examined Mr. House's blue jeans, Mrs. Muncey's bra, nightgown and housecoat, the pair of tennis shoes, the styrofoam box and the various laboratory reports and case files.

Ms. Sutton testified in general as to different types of bloodstains: a transfer bloodstain which is blood that has been transferred from one bloody object or surface to another surface; a soaking type stain which either originates on the inside and soaks out, or originates on the outside and soaks in; a passive type stain or blood flow type stain; and a blood spatter which results from a source of blood being impacted. Ms. Sutton tested

the blue jeans and Mrs. Muncey's clothing for the presence of blood. She did not attempt to identify the blood.

Ms. Sutton marked with white arrows the areas she tested on the blue jeans. [Petitioner's exhibit 17 (actual exhibit withdrawn and photographs of front and back substituted; also respondent's collective exhibits 17a-b & 18a-h)]. She found a transfer bloodstain on the inside of the right pants leg, a small bloodstain on the inside waistband beside the button closure, and a transfer bloodstain inside the right pants pocket. In Ms. Sutton's opinion, these bloodstains could not have been the result of spillage because they did not soak through. Also, Ms. Sutton testified that the stains should have been localized if they were the result of spillage.

Ms. Sutton also found blood mixed with mud on the front left pants leg, the right knee, the lower left pants leg, the back of the lower right pants leg, and the left hip pocket. From that she concluded the blood stains could not have resulted from spillage because the blood and mud would have had to have spilled at the same time.

Ms. Sutton examined the styrofoam box. [Petitioner's exhibit 22 (actual exhibit withdrawn and photographs 22a-c substituted; also respondent's collective exhibits 19a-d, 20a-b, 21a-b, 22a, 23a-e, & 24a-e)]. Ms. Sutton testified that when the blood patterns on

the lid and container are matched in a continuous pattern, the evidence tape is misaligned; when the evidence tape is aligned, the blood patterns do not match. Thus, the spillage inside the container did not occur when the evidence tape was in alignment. Based upon this, the respondent suggests that the spillage occurred after the evidence box was received by the FBI and the items analyzed by Agent Bigbee.

Ms. Sutton also testified regarding the blood stains on Mrs. Muncey's clothing. The right front shoulder of the housecoat and the nightgown each had a blood flow soaking stain that was consistent with the position in which the body was found. The left shoulder and back of the housecoat had light staining which would indicate Mrs. Muncey was in a pool of blood for some time - but not a long time - because there was not a similar stain on the nightgown.

The surface of the housecoat and the nightgown had a few stains which Ms. Sutton classified as medium velocity impact spatter. According to Ms. Sutton, the initial blow to the head that caused the laceration would have caused a small amount of spatter in the area of the wound. The medium velocity impact spatters on the housecoat and nightgown were caused by a subsequent blow that caused the blood to fly away.

III. Conclusions of Law

The fact that several witnesses testified Mr. Muncey admitted killing his wife does not, without more, afford Mr. House relief. The Supreme Court has held that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on habeas corpus." *Townsend v. Sain*, 372 U.S. 293, 317 (1963), *rev'd on other grounds*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). *See also Armstead v. Maggio*, 720 F.2d 894, 896-96 (5th Cir. 1983) (district court did not abuse its discretion in refusing to consider the affidavit of another confessing to the crime); *Shaver v. Ellis*, 255 F.2d 509, 511 (5th cir. 1958) (a confession by another does not render a conviction void and subject to collateral attack).

In addition to a claim of actual innocence, a habeas petitioner must demonstrate "an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). Thus, "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. Accordingly, the habeas petitioner must "show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

The court concludes that Mr. House has failed to demonstrate his actual innocence of the murder of Mrs. Muncey. Mr. House claims that Mr. Muncey was the one who actually killed Mrs. Muncey. For that, he relies on the testimony of witnesses who state they heard Mr. Muncey confess to the killing. The court is not impressed with the allegations of individuals who wait over ten years to come forward with their evidence. This is especially true when there was no physical evidence in the Munceys' kitchen to corroborate his alleged confession that he killed her there.

Mrs. Muncey's daughter, Lora, did not hear her parents argue that night, nor did she see any signs of a struggle. She did hear a man with a deep voice inform Mrs. Muncey that Mr. Muncey had been involved in a wreck. Because Mr. House testified at the evidentiary hearing, the court is cognizant of the fact that Mr. House has a deep voice.

Mr. House also relies on the leakage of Mrs. Muncey's blood in the styrofoam container. Without question, one or more tubes of Mrs. Muncey's blood spilled at some time. It is likely the spillage occurred prior to the receipt of the evidence by laboratory hired by Mr. House's trial attorney. Based upon the evidence introduced during the evidentiary hearing, however, the court concludes that the spillage occurred after the FBI crime laboratory received and tested the evidence.

Mr. House also relies on Dr. Blake's testimony regarding enzyme deterioration on the blue jeans. However, the enzyme deterioration, as well as Mr. Muncey's alleged confession and the blood spillage, does not negate the fact that Agent Scott saw what appeared to be bloodstains on Mr. House's blue jeans when the jeans were removed from the laundry hamper at Ms. Turner's trailer and that the blood was in fact from Mrs. Muncey.

In considering the respondent's motion for summary judgment, the court determined that Mr. House's claims of ineffective assistance of counsel, although procedurally defaulted, should not be barred until the conclusion of the evidentiary hearing because they are intertwined with his claim of actual innocence. *Bousley v. United States*, 118 S. Ct. 1604, 1611 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'") (citations omitted).

Mr. House having failed to demonstrate his actual innocence, his associated claims of ineffective assistance of counsel based upon counsel's failure to adequately investigate Mr. House's guilt or innocence and failure to call all available witnesses that would have benefitted the defense, failure to adequately investigate mitigating circumstances, and

failure to call appropriate witnesses or put on appropriate evidence during the penalty phase are barred on the ground of procedural default.

In addition to his claim that he is innocent of Mrs. Muncey's murder, Mr. House also alleges that he is "innocent of the death penalty." In order to demonstrate actual innocence of the death penalty, a habeas corpus petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

In imposing the death penalty, the jury found the State had established three statutory aggravating circumstances: Mr. House had a prior felony conviction involving the use or threat of violence; the homicide was especially heinous, atrocious, or cruel; and the homicide was committed while Mr. House was committing or attempting to commit or fleeing from the commission of rape or kidnapping.

Mr. House has not demonstrated any constitutional error that led to the imposition of the death penalty. The fact that it was not his semen on Mrs. Muncey's clothing does not negate the jury's finding that the murder was committed during the commission of kidnapping or during the attempted commission of rape or kidnapping. Moreover, either

of the two additional statutory aggravating factors - Mr. House's prior felony conviction and the nature of the homicide - were sufficient to support imposition of the death penalty under Tennessee law. Accordingly, the court concludes that Mr. House is not actually innocent of the death penalty.

IV. Conclusion

Mr. House is not entitled to relief under 28 U.S.C. §2254 and his petition for the writ of habeas corpus will be **DENIED**. The stay of execution previously entered in this matter will be **VACATED**. The petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. §2253(c).

AN APPROPRIATE ORDER WILL ENTER :

James H. Jarvis
UNITED STATES DISTRICT JUDGE

ORIGINAL

FILED
MAY - 6 2005
OFFICE OF THE CLERK

No. 04-8990

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL GREGORY HOUSE,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Did the Sixth Circuit err in applying this Court's decision in *Schlup v. Delo* to hold that petitioner's new evidence was insufficient to excuse his procedural default before the state courts?

2. What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?

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OPINION BELOW

The opinion of the court of appeals that is the subject of this petition is published at 386 F.3d 668. (Pet. App. 1)

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals were entered on October 6, 2004. (Pet. App. 1) Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254, which governs federal habeas corpus remedies for applicants in State custody, provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> (A) the applicant has exhausted the remedies available in the courts of the State . . . .

STATEMENT OF THE CASE

I. Trial and Direct Appeal

Paul Gregory House (hereinafter "petitioner" or House) was convicted in 1986 for the first degree murder of Carolyn Muncey in Union County, Tennessee. The jury sentenced House to death after unanimously finding three aggravating circumstances: (1) that House was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person; (2) that the murder was

especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and (3) that the murder was committed while House was engaged in committing, or was attempting to commit, rape or kidnapping. Tenn. Code Ann. §§ 39-2-203(i)(2), (5), and (7) (1982).

On direct appeal, the Tennessee Supreme Court summarized the evidence at trial:

> The victim of the homicide was Mrs. Carolyn Muncey, who lived with her husband and two young children on Ridgecrest Road in rural Union County, Tennessee. Mrs. Muncey was in her late twenties, and her children were about eight and ten years old at the time of her death on July 13, 1985.
>
> In March 1985 appellant Paul Gregory House was released from prison in Utah and moved to the rural community in which the Muncey family lived. There he resided with his mother and stepfather for several weeks, but in June he moved into a trailer occupied by his girl friend, Donna Turner, which was located about two miles from the Muncey home. Appellant did not own an automobile; but he was permitted to drive his mother's car from time to time, and he also drove Ms. Turner's car on some occasions.
>
> Other than doing occasional farm work for his stepfather, appellant does not appear to have been regularly employed. He did not testify at trial at either the guilt phase or the sentencing hearing. He was shown to have had one prior conviction for aggravated sexual assault, a charge to which he pled guilty on March 16, 1981 in Salt Lake County, Utah. Apparently he was placed on parole in that state, and supervision of his parole was transferred to Tennessee when he returned to this state. He was approximately twenty-three years old at the time of the homicide in this case.
>
> Mrs. Muncey disappeared from her home in the late evening of Saturday, July 13, 1985. Her badly beaten body was found on the following afternoon at about 3 p.m., lying partially concealed in a brush pile about 100 yards from her home.

Apparently the husband of the victim was not at home during the early part of the evening of July 13. Mrs. Muncey and her children visited a neighbor and left at about 9:30 p.m. to return to their home. Later the older child, Laura, awoke. She testified that she heard a voice which sounded like her grandfather making inquiry about her father. She also heard someone tell her mother that her father had been in a wreck near the creek. She heard her mother sobbing or crying as she left the house. When her mother did not return, the two children went to look for her at neighboring homes. Not finding her, they returned home and waited until their father arrived. Discovering that his wife was missing, he took the children back to the home of the neighbor where they had visited earlier in the evening and then called for members of his family to look for his wife.

When the body of Mrs. Muncey was discovered the next afternoon, she was dressed in her nightgown, housecoat and underclothing. Her body was badly bruised, and there were abrasions and blood giving every evidence that she had been in a fierce struggle. Apparently a severe blow to her left forehead had caused her death. It appeared, however, that she had also been partially strangled. A pathologist testified that the blow to her left forehead caused a concussion and hemorrhage to the right side of the brain from which she died, probably one to two hours after being struck. He testified that she probably would have been unconscious after having been struck. He estimated the time of her death at between 9 p.m. to 11 p.m. on Saturday, July 13, but emphasized that this was at best a rough estimate.

Appellant never confessed to any part in the homicide, and the testimony linking him to it was circumstantial. There was evidence showing that he knew Mr. and Mrs. Muncey and had been with them socially on a few occasions. Through defense proof there was testimony that Mrs. Muncey and her husband had been having marital difficulties and that she had been contemplating leaving him. There was no evidence to indicate that the appellant was aware of that situation, however, or that there had been any previous romantic or sexual relationship between him and the victim.

On the afternoon of Sunday, July 14, 1985, two witnesses saw the appellant emerge from a creek bank at the side of Ridgecrest Road at the site where Mrs. Muncey's body was later found concealed in the underbrush. He was wiping his hands with a dark cloth and was walking

toward a white Plymouth automobile, parked on the opposite side of the road, belonging to his girl friend Donna Turner. The two witnesses spoke briefly to appellant, all of them discussing the fact that Mrs. Muncey had disappeared. Later the two witnesses became suspicious of what they had observed and returned to the point where they had seen appellant emerge from the embankment. Looking down the bank, they found the partially concealed body of Mrs. Muncey. They promptly notified the sheriff.

Appellant later admitted that he had been in the area but denied that he had seen the body of Mrs. Muncey or had any knowledge of its presence. The dark rag which he had been using when first seen was never produced. It was the theory of the State, however, that this was a dark "tank top" or jersey which appellant was shown to have been wearing on the previous evening, July 13.

Appellant gave two statements to investigating officers in which he denied being involved in the homicide. In both of these statements he stated that he had been at Ms. Turner's trailer the entire evening of July 13 and that he had not left until the next afternoon when he went to look for Hubert Muncey after learning of the disappearance of the latter's wife.

On Sunday afternoon various witness [sic] observed that appellant had numerous scratches and bruises on his arms, hands and body, there being an especially significant bruise on the knuckle of his right ring finger. Appellant explained that these injuries had been sustained innocently earlier during the week, but when Ms. Turner was called as a witness, she said that she had not observed them prior to the evening of July 13. Appellant also told investigators that he was wearing the same clothes on Sunday, July 14 as he had been wearing the previous evening. It was later discovered, however, that a pair of blue jeans which he had been wearing on the night of the murder was concealed in the bottom of the clothes hamper at Ms. Turner's trailer. These trousers were bloodstained, and scientific evidence revealed that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with appellant's own blood. Scientific tests also showed that fibers from these trousers were consistent with fibers found on the clothing of the victim. There were also found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant.

> Some of the most damaging evidence against appellant was given by his girl friend, Ms. Turner. She at first told investigators that he had not left the trailer during the course of the evening of July 13. Later, however, she modified this testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. She stated that he did not take her automobile. When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing his blue jersey or his tennis shoes. The shoes were later found in an area different from the place where appellant told her he had lost them.
>
> Appellant told Ms. Turner that he had thrown away the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him. It was after the appellant's return to the trailer that Ms. Turner first noticed the bruises and abrasions on his hands referred to previously.
>
> Appellant's mother testified that he had not used her automobile on Saturday evening. She testified that during Saturday and Sunday she had been planning to separate from appellant's stepfather and that appellant had been assisting her in her preparations for moving.
>
> At the sentencing hearing the State proved appellant's prior conviction for aggravated sexual assault. Appellant's parents testified that he came from a broken home and had been subjected to stress as a result of that experience. Appellant's mother also testified that in the interval between the guilt trial and the sentencing hearing appellant had attempted suicide. She read into evidence a letter which he had written to her denying his involvement in the homicide. Apparently he had cut his wrists while in the jail awaiting the sentencing hearing, but the degree and extent of the injuries were not detailed in evidence. They do not appear to have been serious and did not prevent his attending the sentencing hearing.

State v. House, 743 S.W.2d 141, 142-44 (Tenn. 1987).

The Tennessee Supreme Court affirmed House's conviction and death sentence. *Id.* at 144. After concluding that the evidence was sufficient to support both, the Court rejected House's numerous claims of trial error, save one. The Court determined that,

in proving House's prior violent felony conviction at the sentencing hearing, the State should not have been permitted to elicit testimony disclosing the length of his sentence for the prior offense and the fact that he was on parole at the time of the Muncey murder. The Court found the error to be harmless beyond a reasonable doubt, however, given the strength of the evidence establishing the three aggravating circumstances found by the jury, the "minimal proof of any mitigating factor," and "the fact that the State did not make any reference in closing argument to the length of [House's] prior sentence or to his parole status." *Id.* at 147.

II. State Post-Conviction Proceedings

In 1988, the state trial court denied House's first petition for post-conviction relief, in which he alleged, among several claims, that he had been denied the effective assistance of counsel at trial and sentencing. Following a hearing on the petition at which House elected not to introduce any proof other than the original trial transcript, the trial court denied post-conviction relief. On appeal, House raised only one claim — that an alleged error in the jury instructions at sentencing suggested that unanimity was required as to the existence of mitigating circumstances. House did not challenge the trial court's ruling on his ineffective assistance of counsel claim. The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court, and the Tennessee Supreme Court denied House's application for permission to appeal. *House v. State*, No. 28, 1989 WL 152742 (Tenn. Crim. App. Dec. 15, 1989) (app. denied Mar.